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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 29

JAMES B. GULLY, STATE TAX COLLECTOR FOR THE STATE OF MISSISSIPPI, PETITIONER,

vs.

FIRST NATIONAL BANK IN MERIDIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 10, 1936.

CERTIORARI GRANTED MAY 18, 1936.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN CHANCERY COURT OF LAUDERDALE COUNTY

JAMES B. GULLY, State Tax Collector,

versus

FIRST NATIONAL BANK IN MERIDIAN

BILL OF COMPLAINT—Filed Aug. 1, 1933

To the Honorable A. B. Amis, Sr., Chancellor:

Now comes James B. Gully, State Tax Collector, by his [fol. 2] attorneys, and humbly complaining of the First National Bank in Meridian would show unto the Court the following facts, to-wit:

1st. That your complainant, James B. Gully, is the duly elected, qualified and acting State Tax Collector of the State of Mississippi, and as such is authorized to sue for and recover in his own name all debts and taxes due said State of Mississippi or any subdivision or municipal corporation thereof, and especially the debts and taxes hereinafter mentioned.

2nd. That the defendant, First National Bank in Meridian is a national banking association organized and existing under the laws of the United States of America and domiciled in the City of Meridian, Lauderdale County, Mississippi.

3rd. That the City of Meridian was on and prior to January 1st, 1930, and still is a municipal corporation duly organized and existing under the laws of the State of Mississippi and was during the whole of the year 1930 duly authorized by law and its charter to levy and collect taxes upon all the taxable property in said city for each and all of the purposes hereinafter set forth.

4th. That the County of Lauderdale was on and prior to January 1st, 1930, and still is a political subdivision of the

State of Mississippi and was during the whole of the year 1930 duly authorized by law to levy and collect taxes upon all the taxable property in said county for each and all of the purposes hereinafter set forth.

5th. That the City of Meridian together with certain additional and adjacent territory did on and prior to January 1st, 1930, and still does constitute by a law a municipal separate school district known as the Meridian Separate [fol. 3] School District, which municipal separate school district, acting by and through the duly constituted officers of the City of Meridian, was during the whole of the year 1930 duly authorized to levy and collect taxes upon all of the taxable property in said municipal separate school district for each and all of the purposes hereinafter set forth.

6th. That the First National Bank of Meridian was on and prior to the first day of January, 1930, and throughout the entire year 1930 and until January 13th, 1931, a national banking association organized and existing under the laws of the United States of America and was during all of said time domiciled in and maintained its principal and only place of business within the said City of Meridian, and within said Meridian Separate School District, and within Lauderdale County, in the State of Mississippi.

7th. That during the year 1930 the said First National Bank of Meridian was subject to taxation by the State of Mississippi, by the County of Lauderdale, by the City of Meridian and by the Meridian Separate School District upon its capital stock, surplus and undivided profits in the manner provided by the laws of the State of Mississippi and the charter and ordinances of said City.

8th. That during the year 1930 and in strict compliance with the laws of the State of Mississippi the First National Bank of Meridian, acting through its proper officers, made due and legal report or return to the Tax Assessors of Lauderdale County, Mississippi, of the number and amount of all the shares of its capital stock paid in and of the sum of all undivided profits, surplus and accumulation of every sort constituting a part of the assets of said First National Bank of Meridian, excluding its real estate, upon which return the Tax Assessor of Lauderdale County proceded ac- [fol. 4] cording to law to assess the said capital stock, sur-

plus and undivided profits to said First National Bank of Meridian for the State and County taxes for the year 1930, said assessment being made upon page 12 of the Personal Assesment Roll of Lauderdale County for the year 1930 and being in words and figures as follows, to-wit:

Page 12

Name—Bank, First

Bank's capital stock, surplus and undivided profits, less book value of real estate	$540,135.00
Total Valuation of all Personal Property	540,135.00

9th. That thereafter and within the time prescribed by law the said personal Assessment Roll of Lauderdale County for the year 1930, after first being duly sworn to by said Assessor in the form prescribed by law, was duly filed by said Assessor with the Clerk of the Board of Supervisors of Lauderdale County, Mississippi.

10th. That thereafter, after due and lawful notice given and published, and after fully and strictly complying with each and all of the requirements of law the said Board of Supervisors of Lauderdale County, Mississippi, did in lawful meeting, at the time and place and in the manner prescribed by law approve and ratify said Personal Assessment Roll of Lauderdale County for the year 1930, including therein the assessment of the capital stock, surplus and undivided profits of the First National Bank of Meridian. A true and correct copy of the order of said Board of Supervisors approving said Assessment Roll as same appears of Record in Vol. 19 at page 14 of the minutes of said Board of Supervisors is hereto attached, marked Exhibit "A" and made a part hereof, and also by a further order in Min. [fol. 5] Book 19, page 50, copy being attached hereto as Exhibit "A-1."

11th. That thereafter in due course of law a copy of said Personal Assessment Roll was filed with the State Tax Commission of the State of Mississippi and was in due course approved by said State Tax Commission on November 5th, 1930, a true and correct copy of the order of approval being hereto attached, marked Exhibit "B" and made a part hereof.

12th. That thereafter and during the month of November, 1930, the said Board of Supervisors of Lauderdale County did, in lawful meeting, at the time and place and in the manner prescribed by law, levy certain ad valorem taxes for the year 1930 upon all the taxable property in the City of Meridian for the purposes and in the amounts as follows, to-wit:

Fund or purpose	Rate in mills per dollar
General County Fund	6.00
Road Fund	2.00
East Miss. Junior College	.10
Bridge & Culvert Interest & Sinking Fund	.40
Funding Bonds, Interest & Sinking Fund	.50
Loan Warrant Fund	.40
Tuberculosis Hospital	.50
Road Bonds, Interest & Sinking Fund	1.10
Road Improvement Bonds, Interest & Sinking Fund	.25
Good Roads Dist. No. 1—Interest & Sinking Fund	1.75
Good Roads Dist. No. 1—Maintenance Fund	3.00

thus making a total levy against the taxable property in said City of Meridian of sixteen mills per dollar. A true and correct copy of said order of the Board of Supervisors levying said taxes being hereto attached, marked Exhibit "C" and made a part hereof.

[fol. 6] 13th. That the Legislature of the State of Mississippi did at the regular session in 1930 levy a tax for the year 1930 of eight mills upon the dollar against all the taxable property in said State, said levy being made by Chapter 161 of the laws of Mississippi of 1930 approved on the 17th day of May, 1930.

14th. That by reason of all of the foregoing there became due the State of Mississippi the sum of Four Thousand Three Hundred Twenty One and 08/100 Dollars as taxes for the year 1930 against said capital stock, surplus and undivided profits of said First National Bank of Meridian.

15th. That also by reason of all of the foregoing there became due the County of Lauderdale the sum of Eight Thousand Six Hundred Forty Two and 16/100 Dollars as taxes for the year 1930 against said capital stock, surplus

and undivided profits of said First National Bank of Meridian.

16th. That said taxes, due both the State of Mississippi and the County of Lauderdale, were due by the shareholders of the said First National Bank of Meridian, but said First National Bank of Meridian was, by law, liable to pay said taxes as the agent of each of its shareholders and was authorized to pay same out of their individual profit account, or to charge same to their expense account or to any other account which said shareholders might have with said Bank, all in proportion to their ownership.

17th. That under the law the said taxes so due the State of Mississippi and the County of Lauderdale became and were debts due by the several shareholders of said First National Bank of Meridian to the said State of Mississippi and County of Lauderdale.

[fol. 7] 18th. That it became and was the duty of said First National Bank of Meridian to pay the amount of said taxes to the Sheriff and Tax Collector of Lauderdale County on or before the 1st day of December 1930 and to charge same to the individual profit accounts of its said shareholders, or to their expense accounts or to any other accounts said shareholders might have had with said Bank.

19th. That during the period from January 1st, 1930, to January 13th, 1931, and also during the period from April 1st, 1930, to January 13th, 1931, and also during the period from December 1st, 1930, to January 13th, 1931, the said First National Bank of Meridian had in its possession and under its control divers large sums of money belonging to its said shareholders said money being both dividends declared upon the said shares as well as money on deposit in said bank to the separate accounts of said shareholders. The exact amount of such dividends and deposits is unknown to your complainant, but on information which he believes to be true, he avers that same was as to each and every of said shareholders largely in excess of each shareholders prorata portion of said taxes due the State of Mississippi and the County of Lauderdale as hereinbefore set forth.

20th. That notwithstanding its duty to pay the amount of said state and county taxes, to-wit: the sum of Twelve

Thousand Nine Hundred Sixty Three and 24/100 Dollars to the Sheriff and Tax Collector of Lauderdale County on or before December 1st, 1930, out of the funds and moneys of its shareholders then and theretofore in its possession, the said First National Bank of Meridian wholly failed, neglected and refused so to do and thereby became and was liable and indebted, directly and primarily, unto the said State of Mississippi and the County of Lauderdale for the full amount of said taxes.

[fol. 8] 21st. That during the year 1930, in strict compliance with the laws of the State of Mississippi and the Charter, Charter Amendments and Ordinances of the City of Meridian, the First National Bank of Meridian, acting through its proper officers, made due and legal report or return to the Tax Assessor and Collector of the City of Meridian, Mississippi, of the number and amount of all the shares of its capital stock paid in and of the sum of all undivided profits, surplus and accumulation of every sort constituting a part of the assets of said First National Bank of Meridian, excluding its real estate, upon which return the City Tax Assessor and Collector of the City of Meridian proceeded according to law to assess said capital stock, surplus and undivided profits to said First National Bank of Meridian for taxes due the City of Meridian and the Meridian Separate School District for the year 1930, said assessment being made upon page — of the Assessment Roll of the City of Meridian for the year 1930 in words and figures as follows, to-wit:

First National Bank:

2600 shares capital stock	$260,000.00
Surplus and Undivided Profits	313,890.00
	$573,890.00
Less Real Estate	33,700.00
	$540,190.00
Total Value of all Personal Property	$540,190.00
Total Tax on same	$ 13,504.75

22nd. That thereafter and within the time prescribed by law and the Charter, Charter Amendments and Ordinances

of the said City of Meridian, the said personal assessment roll of the City of Meridian for the year 1930, after first [fol. 9] being duly sworn to by the said City Tax Assessor and Collector in the form prescribed by law and the said Charter, Charter Amendments and Ordinances, was duly filed by the said City Tax Assessor and Collector with the City Clerk and Treasurer of the City of Meridian, Mississippi.

23rd. That thereafter, after due and lawful notice given and published and after fully and strictly complying with each and all of the requirements of law and said Charter, Charter Amendments and Ordinances, the Board of Mayor and Councilmen in the said City of Meridian, Mississippi, did, in lawful meeting at the time and place and in the manner prescribed by law and said Charter, Charter Amendments and Ordinances, approve and ratify said Personal Assessment Roll of the City of Meridian, Mississippi for the year 1930, including therein the assessment of the capital stock, surplus and undivided profits of the First National Bank of Meridian. A true and correct copy of the order of said Board of Mayor and Councilmen approving the said Assessment Roll as same appears of record in Ordinance Book No. 7 at page 519 of the Records of said Board of Mayor and Councilmen is hereto attached, marked Exhibit "C-1" and made a part hereof.

24th. That thereafter on the 28th day of October, 1930, the said Board of Mayor and Councilmen of the City of Meridian did, in lawful meeting at the time and place and in the manner prescribed by law and the said Charter, Charter Amendments and ordinances, levy certain ad valorem taxes for the said City of Meridian for the year 1930 upon all of the taxable property in the City of Meridian, Mississippi, in the total amount of 15 mills upon each dollar, said levy being made by an ordinance No. 751 and entitled, "An Ordinance to Provide a Revenue for the City of Meridian for the Fiscal Year 1930," passed by the [fol. 10] councilmen and approved by the Mayor the 28th day of October, 1930, a true and correct copy of which is hereto attached, marked Exhibit "D" and made a part hereof and is here referred — for a detailed statement of the objects and purposes for which the said tax was levied.

25th. That on the 28th day of October, 1930, the said Board of Mayor and Councilmen of the City of Meridian did, in lawful meeting at the time and place and in the manner prescribed by law, said Charter, Charter Amendments and Ordinances, levy certain advalorem taxes for the Meridian Separate School District for the fiscal year 1930 upon all of the taxable property in the said Meridian Separate School District, said levy being in the total amount of ten mills on each dollars valuation, which said levy was made by an ordinance No. 752, entitled, "An Ordinance to Provide a Revenue and Levy a Tax for the Meridian Separate School District for the Fiscal Year 1930," passed by the Councilmen and approved by the Mayor on the 28th day of October, 1930, a true and correct copy of which ordinance is hereto attached marked Exhibit "E" and made a part hereof and is now specially referred to for a detailed statement of the objects and purposes for which said tax was levied.

26th. That by reason of all of the foregoing there became due the said City of Meridian the sum of Eight Thousand One Hundred Two and 85/100 Dollars as taxes for the year 1930 against said capital stock, surplus and undivided profits of said First National Bank of Meridian.

27th. That also by reason of all of the foregoing there became due the Meridian Separate School District the sum of Five Thousand Four Hundred One and 90/100 Dollars [fol. 11] as taxes for the year 1930 against the said capital stock, surplus and undivided profits of said First National Bank of Meridian.

28th. That said taxes due both to the City of Meridian and the Meridian Separate School District were due by the share holders of the said First National Bank of Meridian, but said First National Bank of Meridian was, by law and the said Charter, Charter Amendments and Ordinances, liable to pay said taxes as the Agent of each of its shareholders and was authorized to pay same out of their individual profit account or to charge same to their expense account or to any other account which said shareholders might have with the said bank, all in proportion to their ownership.

29th. That under the law, said Charter, Charter Amendments and Ordinances, the said taxes so due the City of

Meridian and the Meridian Separate School District became and were debts due by the said shareholders of the said First National Bank of Meridian to the said City of Meridian and the Meridian Separate School District.

30th. That it became and was the duty of the said First National Bank of Meridian to pay the amount of said taxes due the City of Meridian and the Meridian Separate School District to the City Tax Assessor and Collector on or before the first day of December 1930 and to charge the same to the individual profit accounts of its said shareholders or to their expense accounts or to any other accounts said shareholders might have had with said bank.

31st. That during the period from January 1st, 1930, to January 13th, 1931, and also during the period from April 1st, 1930, to January 13th, 1931, and also during the period from December 1st, 1930, to January 13th, 1931, the said [fol. 12] First National Bank of Meridian had in its possession and under its control divers large sums of money belonging to its said share holders, said money being both dividends declared upon the said shares as well as money on deposit in said bank to the separate accounts of said shareholders. The exact amount of such dividends and deposits is unknown to your complainant, but upon information which he believes to be true, he avers that same was as to each and every of said shareholders largely in excess of each shareholder's pro rata portion of the total taxes due the State of Mississippi, the County of Lauderdale, the City of Meridian and the Meridian Separate School District as hereinbefore set forth.

32nd. That notwithstanding its duty to pay the amount of said taxes due the City of Meridian and the City of Meridian and the Meridian Separate School District, to-wit: the sum of Thirteen Thousand Five Hundred Four and 75/100 Dollars to the City Tax Assessor and Collector of the City of Meridian on or before December 1st, 1930, out of the funds and monies of its shareholders then and theretofore in its possession, the said First National Bank of Meridian wholly failed, neglected and refused so to do and thereby became and was liable and indebted, directly and primarily, unto the said City of Meridian and the Meridian Separate School District for the full amount of said taxes.

33rd. That on the 13th day of January, 1931, the said First National Bank of Meridian became insolvent, suspended business and was thereafter duly liquidated by a Receiver appointed by the Comptroller of the Currency.

34th. That between the 13th day of January, 1931, and the 12th day of July, 1931, the defendant, First National Bank in Meridian, was organized for the purpose of ac-
[fol. 13] quiring the assets of the then insolvent First National Bank of Meridian and engaging in the banking business.

35th. That on or about the 4th day of June, 1931, the defendant, First National Bank in Meridian, purchased of and from C. P. Rogers, the then duly appointed and acting Receiver of the First National Bank of Meridian, certain of the assets of said First National Bank of Meridian, said purchase and sale being evidenced by a written contract or agreement entered into between said Receiver and said First National Bank in Meridian pursuant to a decree of the District Court of the United States for the Eastern Division of the Southern District of Mississippi. True copy of said contract is hereto attached, marked Exhibit "F" and made a part hereof.

36th. That by the terms of said contract, Exhibit F hereto, the defendant, First National Bank in Meridian, assumed and became liable for all of the debts and liabilities of the First National Bank of Meridian including among others its debt and liability for all of the taxes hereinbefore mentioned.

37th. That notwithstanding its said obligation the defendant, First National Bank in Meridian, has not paid said taxes or any part thereof to either the State of Mississippi, the County of Lauderdale, the City of Meridian or the Meridian Separate School District, nor to any person for them.

38th. That no person or corporation has paid any portion of said taxes but on the contrary they remain past due and wholly unpaid.

39th. That during the promotion or organization of the First National in Meridian a committee composed of Levi
[fol. 14] Rothenberg, F. J. Hughes and J. M. Wilson acting

for the use and benefit of said First National Bank in Meridian purchased of and from all of the shareholders of the First National Bank of Meridian their several shares of stock and the consideration for the purchase of said several shares of stock was, among other things, that the said First National Bank in Meridian should, after its organization and opening relieve the said shareholders of all statutory liability imposed upon them as shareholders in said First National Bank of Meridian.

40th. That said purchases and sales were in each and every case evidenced by written agreements, sample copies of which are hereto attached, marked Exhibit "H" and "I" and made a part hereof.

41st. That said First National Bank in Meridian was duly organized and began business on June 12th, 1931, and did in due course by appropriate corporate action ratify and confirm the actions of said Committee as set forth in paragraphs Nos. 38 and 39 above and did thereby assume and undertake to discharge all liabilities of every kind imposed by statute upon the said shareholders of the First National Bank of Meridian by reason of their ownership of said shares, among which liabilities was and is the liability to pay all of the taxes due the State of Mississsippi, County of Lauderdale, City of Meridian and Meridian Separate School District, as hereinbefore set forth.

42nd. Complainant has heretofore in this bill of complaint charged that the various assessment and tax levies by the City of Meridian were authorized by and made in strict conformity to the Charter, Charter Amendments and [fol. 15] Ordinances of said City of Meridian. Complainant here and now refers to and specially pleads as such authority the following, to-wit:

(a) An act of the Legislature of Mississippi approved March 5th, 1872 entitled "An Act to Consolidate the Several Acts of Incorporation of the City of Meridian and to Alter and Amend the Same."

(b) An act of the Legislature of Mississippi approved April 4th, 1874, entitled "An Act to amend an act entitled, 'An Act to consolidate the several acts of incorporation of the City of Meridian, and to alter and amend the same,' approved March 5th, 1872, and for other purposes."

(c) An Act of Legislature of Mississippi approved March 7th, 1882 entitled, "An Act to authorize and empower the City of Meridian to issue bonds for water supply sewerage, street improvement, and for other purposes."

(d) An act of the Legislature of Mississippi approved March 16th, 1886 entitled, "An act to amend the Charter of the City of Meridian."

(e) An act of the Legislature of Mississippi approved February 25th, 1888, entitled, "An act to amend the Charter of the City of Meridian in Lauderdale County."

(f) An act of the Legislature of Mississippi approved February 29th, 1888, entitled "An act authorizing the board of Mayor and Councilmen of the City of Meridian to erect a market house, and to issue bonds for that purpose and for other purposes."

(g) An act of the Legislature of Mississippi approved March 3rd, 1888, entitled, "An act in Reference to the free public schools of the City of Meridian."

[fol. 16] (h) An act of the Legislature of Mississippi approved March 6th, 1888 entitled "An act to provide for the issuance of bonds for public school buildings by the City of Meridian, Mississippi."

(i) An act of the Legislature of Mississippi approved February 22nd, 1890, entitled, "An act to amend the Charter of the City of Meridian."

(j) An act of the Legislature of Mississippi approved April 2nd, 1892, entitled, "An act to authorize and empower the City of Meridian to issue bonds for the construction of a sewerage system and for other purposes."

(k) An Act of the Legislature of Mississippi approved February 6, 1894, entitled, "An act to authorize the City of Meridian to issue bonds and to purchase or construct waterworks, and for other purposes."

(l) An Act of the Legislature of Mississippi approved February 11th, 1898, entitled, "An act to authorize the Mayor and Boards of Aldermen and Councilmen of the City of Meridian to issue bonds in the sum of Twenty Thousand Dollars to pave Twenty-second Avenue and

Twenty-fifth Avenue, and thereafter any other streets and avenues, with vitrified brick, and for other purposes."

(m) An Amendment to the Charter of the City of Meridian approved on April 15th, 1901, entitled, "Amendment of an Act to amend an act entitled, 'An act to consolidate the several acts of incorporation of the City of Meridian, and to amend and alter the same,' approved April 4th, 1874.

(n) An amendment to the Charter of the City of Meridian approved February 7th, 1902, entitled, "An amendment to the Charter of the City of Meridian, authorizing [fol. 17] said City to issue bonds to buy lots or lands and to construct a school building thereon, and for other purposes.

(o) A resolution of the mayor and boards of aldermen and councilmen of the City of Meridian electing not to come under the provisions of the chapter on Municipalities in the Annotated Code of 1892, passed and approved on April 20th, 1892.

(p) An amendment to the Charter of the City of Meridian approved June 27th, 1904, entitled, "An act to authorize the City of Meridian to establish and maintain a City Park, and for other purposes."

(q) An amendment to the Charter of the City of Meridian approved October 22nd, 1904, entitled, "An act to amend the city charter of the City of Meridian so as to authorize the mayor and boards of councilmen and aldermen of the said City of Meridian to issue bonds in the sum of thirty-five thousand dollars for sewerage extensions and for the construction of sewerage connections in the City of Meridian, and for other purposes.

(r) An amendment to the Charter of the City of Meridian approved October 22nd, 1904, entitled, "An Act to amend the Charter of the City of Meridian so as to authorize the mayor and boards of aldermen and councilmen of said city to issue bonds in the sum of twenty-five thousand dollars in order to liquidate the floating indebtedness now due from said city, and for other purposes."

(s) An amendment to the Charter of the City of Meridian approved October 22nd, 1904, entitled, "An Act to

amend the city charter of the City of Meridian so as to authorize the mayor and boards of councilmen and aldermen of the said city of Meridian to issue bonds in the sum [fol. 18] of one hundred thousand dollars to pave the streets, avenues and the sidewalks hereafter mentioned, and for other purposes."

(t) An amendment to the Charter of the City of Meridian approved February 22nd, 1906, entitled, "An Act to amend the Charter of the City of Meridian, authorizing said city to issue bonds to buy lots of lands, and to construct school building or buildings thereon, and for other purposes."

(u) An amendment to the Charter of the City of Meridian approved October 16th, 1907, entitled, "An Ordinance amending the Charter of the City of Meridian, Lauderdale County, State of Mississippi, so as to authorize the mayor and boards of councilmen and aldermen of said city to issue bonds to pave and improve certain streets of said city, and for other purposes."

(v) An amendment to the Charter of the City of Meridian approved July 24th, 1909, entitled, "An ordinance amending the charter of the city of Meridian so as to authorize said city to levy and enforce special assessments for special improvements, and to issue and sell bonds to pay for said improvements, and other purposes, procured in conformity to Section 3444 of the Code of Mississippi, 1906."

(w) An amendment to the Charter of the City of Meridian approved January 3rd, 1910, entitled, "An Ordinance amending Section 3 of the Charter Amendment of the City of Meridian, approved by the Governor on the 24th day of July, 1909, so as to authorize the mayor and boards of councilmen and aldermen to issue street paving certificates and levy a general assessment of taxes for the payment of same."

[fol. 19] (x) An amendment to the Charter of the City of Meridian approved May 7th, 1910, entitled, "An Ordinance amending the charter of the city of Meridian, Mississippi, so as to empower and authorize the municipal authorities to make certain public improvements and issue bonds to pay for same, and for other purposes."

(y) An amendment to the Charter of the City of Meridian approved May 18th, 1911, entitled, "An Ordinance amending the Charter of the City of Meridian, Mississippi, so as to empower and authorize the Municipal authorities to borrow money and properly evidence same."

(z) An amendment to the Charter of the City of Meridian approved April 15th, 1912, entitled, "An Ordinance amending the Charter of the City of Meridian, Mississippi, so as to authorize and empower the municipal authorities to require railroad companies to erect, build and construct viaducts, subways, bridges, approaches, and all like necessary safety devices for public travel over or under railroad crossings, and regulate same for the public welfare, and to authorize and empower the municipal authorities to contribute to the cost of approaches in their discretion, and to sell bonds and pay for same, procured in conformity to Section 3444 of the Code of Mississippi, 1906."

(aa) An amendment to the Charter of the City of Meridian approved October 10th, 1913, entitled, "An Ordinance to extend, define and limit the powers of the council of the City of Meridian, Mississippi, to borrow money on the faith and credit of the said city and to issue the bonds of the said city for the moneys so borrowed."

[fol. 20] (bb) An amendment to the Charter of the City of Meridian approved December 30th, 1913, entitled, "An Ordinance to extend, define and limit the powers of the Council of the City of Meridian with reference to acquiring a suitable site for the construction of a New City Hall, providing the funds to pay for same, and for other purposes."

(cc) An amendment to the Charter of the City of Meridian approved March 17th, 1917, entitled, "An Ordinance to extend, define and limit the Powers of the Council of the City of Meridian to purchase lands for a right of way and ordinary depot purposes within said city, for the benefit of Meridian & Bigbee River Railway Company, and to issue and sell the negotiable bonds of said City to raise money for the same."

Premises Considered, your complainant prays that the said First National Bank in Meridian be made a party defendant hereto and required by proper process to this

Court to plead, answer or demur hereto at the August, 1933, Rules of this Court (answer under oath being hereby specially waived) and that upon a final *f*earing hereof a personal decree be rendered against the said First National Bank in Meridian in favor of your complainant, James B. Gully as State Tax Collector, for all of the taxes aforesaid, to-wit: the sum of Four Thousand Three Hundred Twenty-one and 08/100 Dollars for the use and benefit of the State of Mississippi; Eight Thousand Six Hundred Forty-two and 16/100 Dollars for the use and benefit of the County of Lauderdale in said State of Mississippi; Eight Thousand One Hundred Two and 85/100 Dollars for the use and benefit of the City of Meridian in the said state and Five Thousand Four Hundred One and 90/100 Dollars for the use and benefit of the Meridian Separate School District in Lauderdale County in said state, all with interest thereon at the rate of six per centum per annum from the 1st day [fol. 21] of December, 1930, until paid and all costs of this proceeding.

Of if mistaken in the relief prayed for, then for such other, further and different relief as to the Court may seem meet and proper.

And as in duty bound your complainant will ever pray.

James B. Gully, State Tax Collector, by Marshall W. Amis, J. C. Floyd, Attorneys.

EXHIBIT "A" TO COMPLAINT

Supervisors Court, August, 1930, Term

STATE OF MISSISSIPPI,
Lauderdale County:

The Board of Supervisors of said county (after having given notice to the taxpayers of said county by publishing the following:

"To the taxpayers of Lauderdale County, State of Mississippi:

You will please take notice that the assessments of real and personal property on the rolls of 1930 have been changed and corrected by this Board so as to comply with

the laws of the State, and that said revised rolls are now open for examination, and that any objection to any assessments contained in said revised rolls must be made in writing and filed with the Clerk of this Board on or before the first Monday of August, 1930, at his office in the City of [fol. 22] Meridian, said County, and that any or all assessments to which no objection is then and there made, will be made final.

This the 23rd day of July, 1930.

The Board of Supervisors of Said County, by J. B. Holland, Clerk of said Board."

in the Meridian Star, a newspaper located and published at Meridian, Mississippi, which notice was published and circulated by said newspaper on the 24th day of July, 1930, in said county, by said Clerk.)

Met in the Lauderdale County Court House on the 4th day of August, 1930. being the first Monday of August, 1930, and continued in session from day to day hearing objections to assessments, taking testimony of witnesses and examining books, records and papers with reference to the assessments of property to make such changes in the assessments (as fixed by it on the rolls at its July 1930 Meeting) that it was satisfied should be made to fix assessments of property at its actual value so as to establish an equality and uniformity of taxation according to value among the taxpayers of said county. Now, being satisfied that said assessment rolls contain assessments, fair, equal, uniform and just according to the value of the real and personal property therein described, it is therefore hereby ordered that the said rolls and the assessm-nts therein now contained be and they are hereby accepted, approved and made final and that the Final Recapitulations of said assessments rolls be certified to the State Tax Commission on the blanks furnished by it, and as required by law.

[fol. 23] EXHIBIT "A-1" TO COMPLAINT

Pursuant to the directions and requirements of the State Tax Commission of Mississippi, the Board of Supervisors

has completed the revision of the real and personal rolls for the year 1930, as shown by extensions and additions made upon the said Real and Personal Rolls by using Violet Ink. All the increases or reductions as to valuation of property being shown by figures written in Violet Ink opposite the property assessed upon said assessment roll.

It is therefore hereby ordered that the said Real and Personal Assessment Rolls of Lauderdale County for the year 1930, as revised and amended, be and the same are hereby approved, and the Clerk is directed to make two copies of said Rolls, furnishing one to the State Tax Commission, and one to the Sheriff and Tax Collector of Lauderdale County.

EXHIBIT "B" TO COMPLAINT

STATE OF MISSISSIPPI,
County of Hinds:

Whereas, the Clerk of the Board of Supervisors of Lauderdale County has filed with the State Tax Commission a copy of the Personal Assessment Roll of said County as of the first day of January, 1930, in the manner prescribed by law and showing a total assessment of Personal property of $3,662,705.00; and it appearing to the satisfaction of the State Tax Commission that the assessments contained in same have been made and the roll prepared in conformity to the requirements of law, and that the assessments have been fixed in accordance with the orders of this Commission, it is, therefore, ordered that the said Personal Assessment Roll be and the same hereby is approved.

[fol. 24] Ordered and Adjudged this the 5th day of November, A. D. 1930.

The State Tax Commission, by L. C. Franklin, Chairman; by H. H. Castell, Commr.; by Webb Walley, Commr.

Attest: A. S. Coody, Secretary.

EXHIBIT "C" TO COMPLAINT

In the matter of the levy for the fiscal year 1930, for the collection of taxes in Lauderdale County, Mississippi; it

is ordered that the levy for the fiscal year 1930 beginning October 1st, 1930, is hereby fixed as follows:

General County Find	6.00
Road Fund	2.00
School Fund	10.00
School Building and Improvement Interest & Sinking Fund	.50
East Mississippi Junior College	.10
Bridge and Culvert, Interest and Sinking Fund	.40
Funding Bond, Interest and Sinking Fund	.50
Loan Warrant Fund	.40
T. B. Hospital	.50
Road Bond, Interest and Sinking Fund	1.10
Road Improvements Bonds, Interest and Sinking Fund	.25
Good Roads District #1, Interest and Sinking Fund	1.75
Good Roads District #1, Maintenance Fund	3.00
Good Roads District #2, Interest and Sinking Fund	3.50
[fol. 25] Good Roads District #2, Maintenance Fund	2.00
Good Roads District #3, Interest and Sinking Fund	7.00
Goods Roads District #4, Interest and Sinking Fund	7.00
Good Roads District #5, Interest and Sinking Fund	.50
Goods Roads District #5, Maintenance Fund	3.00
Kewanee-Toomsuba Roads District, Interest & Sinking Fund	2.00
Bonita School, Interest and Sinking Fund	4.00
Bonita School Fund	3.75
Cuaseyville School Fund	2.60
Center Hill School Interest and Sinking Fund	2.00
Center Hill School Fund	4.00
Center Hill Building and Improvement Fund	2.00
Collinsville School, Interest and Sinking Fund	2.00
Collinsville School Fund	10.00
Daleville School Fund	10.00
Dixie Highway, Interest and Sinking Fund	1.50
Dixie Highway School Fund	4.00
Dry Creek School, Interest and Sinking Fund	2.00
Dry Creek School Fund	7.00
Enterprise School, Interest and Sinking Fund	3.00
Enterprise School Fund	4.00
Kennedy School Fund	3.00
Kewanee-Alamucha, Interest and Sinking Fund	1.00

Lauderdale School, Interest and Sinking Fund	3.00
Lauderdale School Fund	10.00
Long Creek, Interest and Sinking Fund	3.00
Long Creek School Fund	3.00
Marion School, Interest and Sinking Fund	1.50
Marion School Fund	3.00
Martin School, Interest and Sinking Fund	7.00
Martin School Fund	9.00
Meehan School, Interest and Sinking Fund	1.00
Meehan School Fund	4.00
Obediah School, Interest and Sinking Fund	3.00
[fol. 26] Obediah School Fund	3.00
Ponta School Fund	3.75
Ponta School, Interest and Sinking Fund	2.00
Russell School Fund	4.50
Suqualena School, Interest and Sinking Fund	6.00
Suqualena School Fund	10.50
Vimville School, Interest and Sinking Fund	4.50
Vimville School Fund	4.50
Whynot School, Interest and Sinking Fund	2.00
Whynot School Fund	6.20

Each Person outside the limits of the City of Meridian subject to Road Tax, a $3.00 Road Commutation Tax.

Each person in said county, subject to Poll Tax, a $2.00 Poll Tax.

All taxable property inside the corporate limits of the City of Meridian, and such property as annexed to the City of Meridian Separate School District, are not subject to School Tax of 10 mills.

EXHIBIT "C-1" TO COMPLAINT

No. 597

A Resolution Approving, Adopting and Confirming the Real and Personal Assessment Roll of the City of Meridian for the Fiscal Year 1930, as Heretofore Corrected and Equalized by the Council of Said City.

Whereas, on the — day of —— as the assessment of real and personal property of the City of Meridian was duly

completed, sworn to and filed with the City Clerk & Treasurer of the City of Meridian by C. F. Royals, Assessor & [fol. 27] Tax Collector of the City of Meridian; and,

Whereas, on the 28th day of October, 1930, the Council of the said City of Meridian gave due notice to the tax payers of the City of Meridian in words and figures as follows, to-wit:

"Notice to Tax Payers of the City of Meridian, Mississippi."

Pursuant to the provisions of the Charter and Ordinances of the City of Meridian, notice is hereby given that the assessment or persons and property in the City of Meridian and the Meridian Separate School District for the fiscal year 1930 with the valuation of the property together with the tax laid thereon is now on file in the office of the City Clerk and Treasurer of the City of Meridian and is now ready for inspection and subject to inspection by all and every person interested therein.

Every person who shall or may be dissatisfied with the said assessment of the valuation or the tax laid thereon shall give notice to the Council, in writing, to alter said assessment or valuation or the tax laid on the same, and shall give evidence before the Council, by witness or otherwise, of the correct valuation of such property.

Notice is hereby also given that the Council will meet in the Council Chamber of the City Hall of Meridian, at the hour of ten o'clock in the forenoon, on the 28th day of November, 1930, for the purpose of considering all written complaints touching said assessment and all evidence that may be offered in regard to the same and making all cor- [fol. 28] rections in said assessment which may be warranted by the evidence then and there produced before the Council.

In Testimony Whereof, Witness my signature, this the 28th day of October, 1930.

The Council of the City of Meridian, Mississippi, by W. H. Owen, Mayor."

Which said notice was duly published in the Meridian Star, a public newspaper in the City of Meridian, for a period of ten days, proof of publication of which said notice

is now on file in the office of the City Clerk and Treasurer; and,

Whereas, pursuant to the notice aforesaid, divers tax payers in the City of Meridian and the Meridian Separate School District have given notice to the Council to alter said assessment and valuation and the Council having, on the 28th day of November, 1930, beginning at the hour of ten o'clock A. M. and continuing by adjournment from day to day until Saturday, November 29th, 1930, at ten o'clock A. M., heard and considered the divers complaints of said taxpayers touching the said assessment rolls, both real and personal, and having been fully advised in the premises, have corrected, altered and equalized the assessment of real and personal property on the said assessment rolls as shown by entries in red ink made thereon as well as said rolls to certain corporations there named;

Be It Therefore Resolved by the Council of the City of Meridian, so Ordered, Adjudged and Decreed: That said assessment rolls so corrected and equalized as above indicated, showing a total valuation of all real estate in the sum of — Dollars and a total valuation of all personal property [fol. 29] in the sum of — Dollars and a total valuation of all banks in the sum of — Dollars and a total valuation of all corporations in the sum of — Dollars and a total of all property owned by public service corporations in the sum of — Dollars, and a total amount to be collected on account of sidewalks, curbing, street crossings and street paving benefits in the sum of — Dollars and a total amount to be collected on account of sewerage connections in the sum of — Dollars and a total amount to be collected on account of poll or street taxes in the sum of — Dollars be and the same are hereby approved, ratified and confirmed as the lawful assessment of persons and property in the City of Meridian and the Meridian Separate School District for the fiscal year 1930; and the Mayor of the City of Meridian is hereby authorized, directed and required to cause a copy of said assessment rolls, so corrected and equalized by the Council, to be made up by the City Clerk and Treasurer and to issue his warrant to the Tax Collector attached thereto, which said copy of said assessment rolls and said warrant shall be delivered to the Tax Collecter of said City for the collection of the municipal taxes for the City of Meridian for the fiscal year 1930.

Be It Further Resolved by the Council of the City of Meridian, so Ordered, Adjudged and Decreed: That all complaints and objections to said assessments of persons and property in the said City of Meridian as shown by said assessment rolls, which have not been corrected or altered on said assessment rolls by the Council, are hereby overruled and dismissed for want of sufficient legal proof to warrant the alteration or changing of such assessment.

Passed by the Council and approved by the Mayor, this the 29th day of November, 1930.

W. H. Owen, Mayor.

[fol. 30] EXHIBIT "D" TO COMPLAINT

An Ordinance to Provide a Revenue for the City of Meridian for the Fiscal Year 1930

Be It Ordained by the Mayor and Councilmen of the City of Meridian:

Section 1. That the following taxes for the support and maintenance of the Government of the City of Meridian for the fiscal year 1930, be and are hereby levied on all the real estate and personal property in said City not exempt from taxation by the laws of the State of Mississippi and the ordinances of the City of Meridian, money on hand, loaned or deposited, and all other property of every kind and description within the corporate limits of the City of Meridian which is liable for taxation under the constitution and laws of the State of Mississippi and the Charter and laws of the City of Meridian, to-wit:

2 and 17/20 mills on each dollar's valuation thereof for annual interest on the following outstanding bonds and obligations of the City of Meridian, namely:

$32,000.00 4½% Sewer Bds. dated February 1, 1905.
25,000.00 4½% Funding Bds. dated Feb. 1, 1905.
50,000.00 5% Res. St. Paving Bds. dated Dec. 1, 1909.
50,000.00 5% Drainage Bds. dated Oct. 1, 1910.
15,000.00 5% Park Imp. Bds. dated Jan. 1, 1911.
15,000.00 5% Fire Dept. Bds. dated Jan. 1, 1911.
10,000.00 5% San. Sewer Bds. dated Jan. 1, 1911.
75,000.00 4½% City Hall Bds. dated July 1st, 1911.

8,000.00 5% St. Imp. Bds. dated April 1, 1913.
4,000.00 5% San Sewer Bds. dated April 1, 1913.
48,000.00 5% Funding Bds. dated April 1, 1913.
8,000.00 5% St. Equip. & Bridge Bds. dated April 1, 1913.

[fol. 31]

18,000.00 5% Ry. Term. & R/W Bds. dated Oct. 1, 1913.
10,000.00 5% San. Sewer Br. & Drg. Bds. dated Aug. 1, 1915.
20,000.00 5% City Hall & Jail Bds. dated Aug. 1, 1915.
7,000.00 5% Ref. S/W Paving Bds. dated March 1, 1917.
5,000.00 6% Incinerator Bds. dated May 1, 1920.
5,000.00 6% 1917 Incinerator Bds. dated May 1, 1920.
60,000.00 6% St. Imp. Bds. dated May 1, 1920.
51,000.00 6% Charity Hospital Bds. dated June 1, 1922.
20,000.00 5% Bridge & Sewer Bds. dated June 1, 1923.
1,388.40 6% St. Inter. Bds. dated Aug. 1, 1923.
893.31 6% St. Inter. Bds. dated Aug. 1, 1923.
36,721.48 6% St. Inter. Bds. dated Aug. 1, 1923.
77,582.67 5½% Ref. Sewer Bds. dated May 1, 1924.
69,000.00 5½% St. Inter. Bds. dated May 1, 1924.
54,000.00 4¾% St. Inter. Bds. dated July 1st, 1925.
20,000.00 4¾% San. Sewer & Drg. Bds. dated Aug. 1, 1925.
15,000.00 4¾% St. Exten. Bds. dated Aug. 1, 1925.
16,295.00 6% Ref. St. Paving Bds. dated April 1, 1926.
113,000.00 5% San. Sewer Bds. dated Sept. 1, 1926.
30,000.00 5¼% St. Inter. Bds. dated June 1, 1926.
10,080.00 6% St. Inter. Bds. dated July 1, 1927.
68,000.00 5% R/W Term. & R. W. Bds. dated Sept. 1, 1927.
192,000.00 4½% San. Sewer Ext. & Drg. Bds. dated May 1, 1928.
23,000.00 5% Fire Dept. Ext. & Equip. Bds. dated May 1, 1928.
13,800.00 5% White Way & St. Dept. Bds. dated May 1, 1928.
11,500.00 5% Ref. St. Paving Bds. dated July 1, 1928.

[fol. 32]

86,000.00 5% St. Inter. Bds. dated July 1, 1928.
8,252.89 6% St. Inter. Bds. 8th St. dated Feb. 1, 1929.
91,000.00 6% St. Inter. Bds. dated July 1, 1929.
75,000.00 5¼% Airport Bds. dated Nov. 1, 1929.

Also 4 & 3/20 mills on each dollar's valuation thereof for the payment of the following serial bonds falling due during the fiscal year 1930 namely:

1—5% St. Imp. Bds. dated April 1, 1913.
6—5% Funding Bds. dated April 1st, 1913.
1—5% St. Equip. & Bridge Bds. dated April 1, 1913.
2—5% Ry. Term. & R/W Bds. dated Oct. 1, 1913.
1—5% San. Sewer Bridge & Drg. Bds. dated Aug. 1, 1915.
2—5% City Hall & Jail Bds. dated Aug. 1, 1915.
1—6% Incinerator Bds. dated May 1, 1920.
3—6% Concrete Bridge Bds. dated May 1, 1920.
4—6% St. Imp. Bds. dated May 1, 1920.
3—6% Charity Hospital Bds. dated June 1, 1922.
12—6% St. Inter. Bds. dated June 1, 1923.
4—5½% Ref. Sewer Bds. dated May 1, 1924.
17—5½% St. Inter. Bds. dated May 1, 1924.
10—4¾% St. Inter. Bds. dated July 1, 1925.
1—4¾ San. Sewer & Drg. Bds. dated Aug. 1, 1925.
1—4¾% St. Exten. Bd. dated Aug. 1, 1925.
1—6% Ref. St. Paving Bd. dated April 1, 1926.
3—5% San. Sewer Bds. dated Sept. 1, 1926.
5—5¼% St. Inter. Bds. dated June 1, 1926.
4—4¼% San Sewer Ext. & Drg. Bds. dated May 1, 1928.
1—5% Fire Dept. Exten. & Equip. Bd. dated May 1, 1928.
10—5% St. Inter. Bds. dated July 1, 1928.
1—6% St. Inter. Bds. 8th St. dated Feb. 1, 1929.
10—6% St. Inter. Bds. dated July 1, 1929.
3—5¼% Airport Bds. dated Nov. 1, 1929.

[fol. 33] Each of said bonds for the sum of $1,000.00.

2—5% Ref. S/W Paving Bds. dated Mar. 1, 1917, for $500.00 each.
4—5% R/W Term. & R/W Bds. dated Sept. 1, 1927, for $500.00 each.
2—5% Bridge & Sew. Bds. dated June 1, 1923, for $500.00 each.
1—5% Ref. St. Pav. Bds. dated July 1, 1928 for $500.00.
1—6% St. Inter. Bd. dated Aug. 1, 1923, for $462.80.
1—6% St. Inter. Bd. dated Aug. 1, 1923, for $297.77.
1—6% St. Inter. Bd. dated July 1, 1927, for $1,440.00.
1—5% White Way & St. Dept. Bd. dated May 1, 1928, for $600.00.

Also 8 mills on each dollar's valuation thereof for general purposes, consisting of the maintenance of public order; and maintenance of street, public sanitation, Fire Department, street lighting and park; the support and maintenance of the Carnegie Library and the Lauderdale County Tuberculosis Hospital; and for the purpose of meeting and paying any and all other obligations or expenses of the government of the said City of Meridian during the fiscal year 1930, not hereinbefore specifically mentioned—the total of said tax and levy for specific and general purposes amounting to 15 mills on each dollar's valuation of said property.

Section 2. That a poll or street tax of Five Dollars ($5.00) be levied on each male inhabitant of said City over the age of eighteen years and under the age of sixty years, who is not deaf, dumb or blind, or maimed by the loss of foot or hand, or otherwise exempt by the ordinances of said City. Said poll or street tax, as levied, shall be col-[fol. 34] lected by the Tax Collector at the same time and in the same manner as the other taxes of the City are collected, as provided by law.

Section 3. That this ordinance take effect and be in force from and after its passage, approval and publication as required by law, and that all ordinances or parts of ordinances of the City of Meridian in conflict herewith, be and the same are hereby repealed.

Passed by the Council and approved by the Mayor, this the 28th day of October, 1930.

W. H. Owen, Mayor.

EXHIBIT "E" TO COMPLAINT

No. 752

An Ordinance to Provide a Revenue and Levy a Tax for the Meridian Separate School District for the Fiscal Year 1930

Be It Ordained by the Mayor and Councilmen of the City of Meridian:

Section 1. That the following taxes for the support and maintenance of the Public Schools for the Meridian Sepa-

rate School District for the fiscal year 1930, be and are hereby levied on all of the real estate and personal property within the said Meridian Separate School District not exempt from taxation by the laws of the State of Mississippi, to-wit:

1 and 3/20 mills on each dollar's valuation thereof for the annual interest on the following school bonds and obligations of the City of Meridian, namely:

$35,000.00 4½% School Bonds dated January 1, 1907.
[fol. 35]
9,000.00 4½% Ref. School Bonds dated April 1, 1909.
100,000.00 5% School Imp. Bonds dated July 1st, 1911.
27,000.00 5% School Ext. & Equip. Bds. dated July 1, 1914.
24,411.45 5% Ref. Sch. House Bds. dated Oct. 1, 1922.
430,000.00 5¼% Mdn. Sep. School Dist. Bds. dated May 1, 1924.

Also 17/20 mills on each dollar's valuation thereof for the payment of the following serial school bonds falling due during the fiscal year 1930, namely:

1—4½% Ref. School Bd. dated April 1, 1909.
3—5% Sch. Ext. & Equip. Bds. dated July 1, 1914.
20—5¼% Mdn. Sep. Sch. Dist. Bds. dated May 1, 1924.
2—5% Ref. Sch. House Bds. dated Oct. 1, 1922, for $600.00.

Each of said bonds being for the sum of $1,000.00.

Also 8 mills on each dollar's valuation thereof of said property to pay for fuel and other necessities for the Public Schools of said Meridian Separate School District, and also for maintaining the schools of said Separate School District after the four months' term provided for by the State of Mississippi; also to supplement during said four months; also to repair and equip the school buildings of said Separate School District; and also for the purpose of paying back money borrowed to operate the Public Schools of the said Meridian Separate School District during the months of October, November and December, 1930, and January, 1931, as authorized by an order passed by the [fol. 36] Board of Trustees of the Meridian Separate School District.

Section 2. That the aforesaid tax levy for school purposes, amounting in the aggregate to 10 mills on each dollar's valuation all the taxable property within said Meridian Separate School District, shall be levied, assessed and collected at the same time and in the same manner and under the same penalties for non-payment thereof as the taxes of the City of Meridian for general purposes are levied, assessed and collected.

Section 3. That this ordinance take effect and be in force from and after its passage, approval and publication as required by law, and that all ordinances or parts of ordinances of the City of Meridian in conflict with this ordinance, be and the same are hereby repealed.

Passed by the Council and approved by the Mayor, this the 28th day of October, 1930.

W. H. Owen, Mayor.

EXHIBIT "F" TO COMPLAINT

Contract for Sale of Assets of the First National Bank of Meridian, Mississippi

This agreement made this 4th day of June, 1931, by and between C. P. Rogers, Receiver of the First National Bank of Meridian, Mississippi, hereinafter referred to as the receiver, party of the first part, and the First National Bank in Meridian, Mississippi, hereinafter referred to as the purchaser, party of the second part.

Whereas, the First National Bank of Meridian, Mississippi, hereinafter referred to as the suspended bank, sus- [fol. 37] pended on the 13th day of January 1931, by resolution of its Board of Directors, and said C. P. Rogers was duly appointed as subsequently duly qualified as receiver of said suspended bank, and is now acting as such receiver, and;

Whereas, approximately 90.59% in amount of the unsecured depositors and creditors of said suspended bank have heretofore, for the purpose of facilitating the organization of a new bank, to acquire the assets of said suspended bank so as to enable said assets to be liquidated by said new bank as a going concern rather than to subject said assets to liquidation through a receivership, executed cer-

tain contracts to the committee therein specified, whereunder said creditors so executing said contracts assigned their claims to said committee for the purpose of enabling said claims to be transferred to and utilized by said new bank in purchasing and acquiring the assets of said suspended bank, a draft of the form of one of the said creditors agreement or contracts being hereto annexed and made a part hereof and designated "Exhibit 1" and

Whereas, said new bank has been duly organized, and has been authorized by the Comptroller of the Currency to begin business under the name of the "First National Bank in Meridian, Mississippi", and said First National Bank in Meridian has acquired from said committee named in the aforesaid creditors agreement the aforesaid assigned claims aggregating approximately 90.59% in amount of the known unsecured creditors of said suspended bank, and

Whereas, said First National Bank in Meridian is now ready and willing, as purchaser hereunder, to acquire all of the assets of said suspended bank, and in consideration thereof will surrender to the receiver canceled and dis- [fol. 38] charged receiver's certificates representing the claims of the creditors executing the aforesaid creditors agreements aggregating approximately the said sum of $3,264,765.68, and in addition thereto said purchaser will assume and pay in full with interest the claims of all other creditors against said suspended bank, whether said claims be known or unknown, which may be duly established according to law, and in addition will assume and pay in full all expenses of the receivership of said suspended bank, both accrued and to accrue, including the customary charge of the Comptroller of the Currency for supervision of the receivership, it is, by the parties hereto, in consideration of the mutual promises and covenants to each other hereunto flowing, as hereinafter set forth, agreed as follows:

1. The purchaser does hereunder buy and the receiver does hereunder set all of the assets of said suspended bank, of every kind and description, and wheresoever located, and whether listed or not listed upon the books of said suspended bank, (exclusive of assessment liability of shareholders and liability if any, of director of said suspended bank) a schedule of the known assets of said suspended bank as now shown by its books, according to the best information of the parties hereto, to be set forth in a sched-

ule, to be signed by the parties hereto, designated and marked "Exhibit No. 2", said schedule to constitute part of this contract, but not to be attached hereto, and to be made in three counter-parts, one counter-part to be retained by each of the parties hereto, and one to be forwarded to the Comptroller of the Currency of the United States. It is understood that nothing in this contract contained shall give to the purchasing bank the right to take over and maintain the trust department business of the suspended bank, and that such trust department business as may subsequently be carried on by the purchasing bank [fol. 39] will be a matter separate and apart herefrom and governed by the requirements of the law concerning the establishment and maintenance of trust departments by national banks.

2. The purchaser, by way of payment for the assets hereunder bought, will:

(a) Deliver and surrender to the receiver canceled receiver's certificates aggregating approximately $3,264,765.68 (subject to adjustment in amount as of the date of delivery of the assets hereunder) and constituting approximately 90.59% in amount of the claims of the known unsecured depositors and creditors of said suspended bank.

(b) In addition to the cancellation and surrender and delivery of said receiver's certificates, the purchaser will pay to the receiver (subject to adjustment in amount as of the date of delivery of assets hereunder and subject to the refund of the unused surplus as hereinafter mentioned) the sum of $397,888.78 representing the amount necessary to pay all receivership expenses accrued and to accrue, and to enable the receiver to pay in full, with interest to the date of payment the claims of all known creditors who have not executed the aforesaid creditors agreement (it being the intention and purpose of the parties hereunder that the aforesame sum of $397,888.78 hereunder paid, together with the cancellation, surrender and return of the aforesaid receiver's certificates representing the claims of creditors executing the above mentioned creditors agreements, shall together completely discharge, or enable the receiver to discharge, the claims of all known creditors of said suspended bank and meet in full all receivership expenses accrued and to accrue during the period said receivership is,

in the discretion of the Comptroller of the Currency, contained in active operation), and said purchaser will pay [fol. 40] the receiver such further sums from time to time, during the period of active receivership, as the receiver may deem necessary to meet receivership expenses and to provide for the payment of such unlisted or unknown claims as may be duly established during the period of active receivership, provided, however, that the delivery by the receiver to the purchaser of the assets hereunder agreed to be sold and the payment by the receiver during the period of active receivership of the aforementioned claims of creditors not executing said creditors agreements, shall be considered to be and shall constitute *and* first and final dividend to the creditors of said suspended bank, and if the aforesaid sum of $397,888.78 hereunder paid by the purchaser to the receiver (or retained by the receiver from the assets as hereinafter provided) together with such further sums so paid as the receiver may from time to time deem necessary, as hereinabove provided, shall be found by the Comptroller of the Currency to be more than sufficient to pay, as aforesaid, said receivership agreements, said surplus shall be paid by the receiver to the trustee provided for in said creditors agreements and shall become part of the trusteed assets and subject to all of the purposes and objects of said trust.

(c) The aforesaid sum of $397,888.78 required by subparagraph (b) hereof to be paid by party of the second part to the receiver, may, at the option of the receiver, be retained by the receiver from the cash assets on hand for the purposes provided in said subparagraph (b).

3. It is understood and agreed by the parties hereto that although the transfer of assets hereunder by the receiver to the purchaser shall constitute an absolute and irrevocable sale of said assets, nevertheless the purhaser will, in its contract with the trustees provided for in said creditors agreements hereinabove referred to, whereby a [fol. 41] certain portion of the assets acquired by the purchaser hereunder are transferred to said trustees for liquidation in the manner provided in said creditors agreements, provided that such transfer of said portion of said assets to said trustees shall be subject to the requirement that in the liquidation of said trusteed assets, an accurate

record shall be kept of the liquidation and collection of the same, and that after the lien and/or claim and/or right of substitution or exchange of the party of the second part hereunder upon said trusteed assets and proceeds of liquidation thereof under said creditors agreements, has been satisfied and discharged, and after the depositors and creditors executing said creditors agreements and entitled to participate in said trusteed assets have received payment in full of the portions of their respective claims represented by said trusteed assets, together with interest upon the full amount of the claims of said depositors and creditors as the same existed at the suspension of said First National Bank of Meridian, (without, however, any obligation upon said purchasing bank to pay the portion of claims of said depositors and creditors represented in said trusteed assets, or any interest thereon), the surplus, if any, then remaining, and/or the portion, if any, of such trusteed assets then unliquidated, shall be held for the account of the shareholders of said suspended bank and for payment and/or delivery to such representative or trustee of said shareholders as may be designated by said shareholders to receive said surplus so remaining.

It is understood and agreed between the parties hereto that under and by virtue of the provisions of said creditors agreements, the purchasing bank will transfer to the trustees provided for in said creditors agreements, all of the assets acquired by the purchasing bank from the receiver under numbered paragraph (1) hereof, for administration [fol. 42] by said trustees in conformity to the provisions of said creditors agreements, save and except the following assets which are to be retained absolutely by the purchasing bank as it own property:

(a) All furniture and fixtures at an agreed valuation of $37,399.94;

(b) All real estate at an agreed valuation of $41,362.60;

(c) All claims and warrants (other than notes and bills receivable) at an agreed valuation of $24,891.63;

(d) All stocks at an agreed valuation of $1352.00;

(e) All Bonds at the prevailing market value as of date of delivery by the receiver to said purchasing bank.

(f) A sufficient amount of notes and bills receivable, at face value as of date of suspension (exclusive of all uncollected interest upon said notes and bills receiveable) to be selected by the purchasing bank, as shall, together with the assets enumerated in the foregoing sub-paragraphs a, b, c, d, and e, equal the amount of the liabilities of the creditors absolutely assumed and agreed to be paid by the purchasing bank under said creditors agreements.

It is further understood and agreed that all assets of the suspended bank and/or of the receiver sold and transferred to the purchasing bank under this contract shall be transferred without recourse and without warranty on behalf of or against said suspended bank and/or said receiver and that all necessary instruments and acts of transfer will be executed and performed by the receiver to give effect to this agreement and without in any way affecting the right of substitution of the purchasing bank under said creditors agreements.

[fol. 43] 4. The receiver will, at the time of the delivery of the assets hereunder required, also transfer and assign to the purchaser all contracts covering rental of safe deposit boxes and the purchaser will assume and undertake the further performance and obligations of said safe deposit box contracts, and the delivery of the contents of said boxes to the persons properly entitled to receive the same. The purchaser will also accept from the receiver delivery of all safe keeping items and will assume the further performance of the contracts, oral or written, covering safe keeping items and the responsibility for the further safe keeping and ultimate delivery of the same to the persons properly thereto entitled.

5. The purchaser, will, during the period of active receivership, furnish to the receiver suitable quarters in its banking premises, including light, heat, and janitor service, and also reasonable vault space, and the use of such of the furniture and fixtures of the suspended bank, as may be considered, by the receiver, necessary for receivership purposes during the period of active receivership.

In Witness Whereof the parties hereto have set their hands and affixed their seals this 4th day of June, 1931.

C. P. Rogers, Receiver, First National Bank of Meridian, Mississippi.

Attest:

Stella A. Elson, First National Bank in Meridian, Miss., by Levi Rothenberg, Pres.

Attest: C. M. Lawrence, Cashier. (Seal.)

[fol. 44] Creditors Agreement

For A Valuable Consideration, the undersigned creditor of First National Bank of Meridian, Mississippi, hereby transfers and assigns any and all claims of every nature of the undersigned against said bank and/or any receiver's certificate issued therefor, to Levi Rothenberg, J. M. Wilson and F. J. Hughes as a committee for the First National Bank in Meridian, a new bank to be organized, and to their successors in office as such committee, upon the following terms and conditions:

I. Such committee shall in its own name establish said claims, and obtain a receiver's certificate therefor, unless such certificate has been previously issued.

II. A new bank to be known as The First National Bank in Meridian is to be organized with $400,000.00 cash capital and $100,000.00 cash surplus, to which new bank, when organized and ready for business, this claim and/or such receiver's certificate as may have been issued therefor, will be transferred by such committee.

III. Such new bank, when organized, will assume and pay 75% of such claims as follows:

1. Ten per cent thereof, without interest, on date of opening of new bank.

2. Fifteen per cent thereof, without interest, in twelve months from date of opening of new bank.

3. Twenty-five per cent thereof, without interest, twenty-four months from date of opening of new bank.

[fol. 45] 4. Twenty-five per cent thereof, without interest, thirty-six months from date of opening of new bank.

As to such amount of said claim as is agreed to be paid twelve, twenty-four and thirty-six months from date of opening of new bank, said new bank will issue to the undersigned is transferable certificate of deposit without interest.

5. As to the remaining twenty-five per cent of said claims, the new bank will not assume nor agree to pay same, but will obligate itself to set apart in a trust fund, and transfer to trustees to be named by the board of directors of the new bank, certain loans and discounts aggregating a par or face value of approximately $1,254,-766.09 of First National Bank of Meridian acquired of the receiver of such bank by the new bank, to be liquidated by the trustees so named, on the following terms:

a. Such assets so set apart, transferred and assigned to such trustees shall, by such trustees, be liquidated without charge for their services, and without any expense except such as are necessarily incurred in the sale, conversion of such assets into cash, and/or such actual costs of Court and attorney's fees as may be necessarily incurred in the collection of such assets.

b. The trust shall continue in force and effect until the purpose thereof as herein set forth shall have been accomplished, with the right in the new bank, for a period of two years from the date of the opening thereof, to substitute any assets in its hands, acquired from the Receiver of the First National Bank of Meridian, for a corresponding amount of cash in the hands of such trustees derived from the liquidation of such trusteed assets, adjustment of interest to be made as of the date of such substitution; and with the further right in the new bank, dur-[fol. 46] ing such period of two years, to substitute in lieu of cash by it delivered to the trustees, a corresponding amount of the trusteed assets, if the new bank shall so elect; and with the further right in the new bank, if it so elects, to exchange with the trustees any assets of the new bank, acquired from the First National Bank of Meridian, for a corresponding amount of the trusteed assets, adjustment of interest to be made as of the date of such exchange. The new bank shall have the further right to be reimbursed by the trustees, as soon as funds in the hands of such trustees are sufficient and available therefor,

from the liquidation of such trusteed assets, for the expenses of the receivership of the First National Bank of Meridian, including those accrued, as well as those accruing during the period of such receivership.

c. At the expiration of such period of two years, such right of substitution, and/or exchange of assets of the new bank, shall terminate, and thereupon the trustees shall distribute, from time to time, the proceeds of the liquidation of such trusteed assets to the creditors entitled thereto to the payment of the unpaid 25% of their claims against the First National Bank of Meridian, secured by this trust agreement, together with interest upon the full amount of the claims of said creditors as the same existed at suspension for the period any part of said claims remain unpaid, such distribution to be in equal and ratable proportion of the amounts of their respective claims. Any amount remaining in the hands of the trustees after payment of such 25% of said claims, together with interest upon the full amount of the claims of said creditors as the same existed at suspension for the period any part of said claims remain unpaid, shall be distributed ratably to stockholders of First National Bank of Meridian.

[fol. 47] Whenever the trustees have as much as $25,000.00 in hand in cash, from the liquidation of such trusteed assets available for distribution to creditors under the terms of this agreement, such trustees shall make distribution thereof as hereinabove agreed.

d. The trustees shall convert the trusteed assets into cash as expeditiously as is consistent with good business principles, and in doing so shall have the right, in their name as trustees, to cause foreclosure of mortgages, to purchase mortgaged property at such foreclosure sales for the benefit of the trust estate whenever in the judgment of the trustees it is advisable so to do; to sell and convey any real or personal property, or collaterals pledged as security for the payment of the loans and discounts constituting the trust estate; to sell and convey any and all assets of the trust estate, and to settle and compromise with the debtors of the trust estate, on such terms as the trustees may deem advisable, by and with the approval of the board of directors of the new bank; to pay taxes on such trusteed assets, and keep the same insured and in repair

at the expense of the trust estate; and to institute and prosecute to judgment, in their names as such trustees, in Courts of competent jurisdiction, suits against parties indebted to the trust estate, and to collect such judgments; and to do any and all such acts, and to take any and all such proceedings, and to make any and all such adjustments, and to execute all such receipts and conveyances, as are necessary for the preservation and conversion into cash of all of the trusteed assets.

The trustees shall have full power to carry, at the expense of the trust estate, such liability insurance as in the judgment of the board of directors of the new bank may be advisable.

[fol. 48] e. At any time after the expiration of two years from the date of the opening of the new bank, upon the written request of twenty per cent in amount of the claims secured by this trust agreement, addressed to the new bank, the board of directors of the new bank will call upon and require the trustees to sell all of the trusteed assets at public outcry, to the highest bidder for cash, in front of the Court House door in the County of Lauderdale, State of Mississippi, after having given due notice of such sale as may be required by law at the time of such sale, and to conclude such trust and make final distribution of the proceeds of the trusteed assets as hereinabove stipulated.

f. The board of directors of the new bank shall have the right, in their discretion and at any time, to require the trustees to render accounts to the board of directors of the new bank of the liquidation of such trusteed assets; to require, in their discretion, the trustees to enter into bond for the faithful discharge of their duties as trustees, premiums on such bond to be paid out of the trust estate; to remove any trustee at any time, with or without cause, and to fill all vacancies occasioned by their removal and/or resignation, and/or death, and/or inability to serve on the part of such trustees or any trustee.

g. For such 25% of the claim of the creditors, together with interest upon the full amount of the claims of said creditors as the same existed at suspension for the period any part of said claims remain unpaid, the trustees will issue to the creditor a transferrable certificate of participa-

tion in such trusteed assets, showing the extent and nature of the creditor's interest herein.

h. It is further understood and agreed that the new bank shall not be held accountable in any way for any default, negligence or fraud on the part of the trustees; and that [fol. 49] the trustees shall not be liable in any event, except for fraud and/or misappropriation of funds on their part.

i. The new bank and the trustees named by its board of directors are hereby irrevocably authorized to execute a trust agreement as to such assets agreed to be trusteed on the terms hereinabove set forth.

IV. The undersigned will accept the consideration named in paragraph III hereof in full of such claims of the undersigned against the First National Bank of Meridian, and hereby irrevocably authorizes such committee, and/or its successors in office as such committee, and/or the new bank, to receipt the Receiver of First National Bank of Meridian, and the Comptroller of the Currency in full therefor.

V. This agreement shall be and is binding on the undersigned, and the successors, legal representatives and assigns of the undersigned, subject to the following conditions:

a. That such new bank is organized and opened, purchases the assets of First National Bank of Meridian of the Receiver thereof, as provided by law, and assumes seventy-five per cent of the claims of the undersigned as agreed, and places in trust the stipulated amount of loans and discounts according to the tenor and terms hereof.

b. That in the event the new bank is not opened within four months of February 15th, 1931, such committee will transfer such claims and the Receiver's certificate issued therefor to the undersigned, and/or the successors, legal representatives or assigns of the undersigned.

[fol. 50] VI. This agreement shall bind and inure to the benefit of, the successors, legal representatives and assigns of the undersigned.

Witness the signature of the undersigned, this the — day of ——, 1931.

—— ——.

Witnesses: —— ——, —— ——.

EXHIBIT "H" TO COMPLAINT

The First National Bank in Meridian is now in process of organization and will after its organization and opening relieve the shareholders of the First National Bank of Meridian, of the statutory liability imposed upon them as shareholders in such suspended bank.

The undersigned being a shareholder of the First National Bank of Meridian, in consideration of being relieved from the statutory liability imposed on the undersigned as such shareholder, does hereby transfer, set over and assign unto the First National Bank in Meridian, its successors and assigns, all stock owned by the undersigned in the First National Bank of Meridian, Mississippi, represented by Certificate No. — for a total of — shares, such stock to be delivered to Levi Rothenberg, J. M. Wilson, and F. J. Hughes as a committee to be by them held in escrow until organization and opening of the First National Bank in Meridian, Miss., after which such stock so delivered to them is to be by them delivered to the First National Bank in Meridian, Miss., such transfer and assignment being made, however, on the following terms, and conditions, to-wit:

1. That the First National Bank in Meridian, Miss., is opened on or by June 15th, 1931.

[fol. 51] 2. That the undersigned be relieved and held harmless from any and all statutory liability as a shareholder of the First National Bank of Meridian, Mississippi.

3. That the First National Bank in Meridian will pay to the undersigned the pro rata share, if any, accruing to the undersigned from the assets agreed to be trusteed under the creditors agreement with creditors and depositors of the First National Bank of Meridian and Levi Rothenberg, F. J. Hughes and J. M. Wilson as a committee for the First National Bank in Meridian.

In the event that the First National Bank in Meridian is not opened as agreed, the stock delivered to the committee herein named is to be by such committee redelivered to the undersigned, his, her or its legal representatives, successors or assigns. This agreement shall become binding upon and

inure to the benefit of the successors, legal representatives and assigns of the undersigned.

Witness my signature, this the — day of ——, 1931.

—— ——.

EXHIBIT "I" TO COMPLAINT

Received from —— ——, a shareholder of the First National Bank of Meridian, Mississippi, Certificate No. —, representing a total number of — shares of stock of the First National Bank of Meridian, Mississippi of the par value of $100.00, delivered to the undersigned as a committee as provided in the agreement executed by the shareholder, such stock to be re-delivered by the undersigned [fol. 52] committee to such shareholder in the event that the agreement of transfer made by the shareholder is not complied with.

Witness our signatures, this — day of ——, 1931.

Levi Rothenberg, F. J. Hughes, J. M. Wilson, Committee.

NOTATION AS TO SUMMONS, ETC.

Summons was duly issued and served, returnable to the rules day of said Court to be held on the second Monday of August, 1933. Within the time allowed by the State Law to plead to such suit, defendant filed petition to remove.

IN CHANCERY COURT OF LAUDERDALE COUNTY

[Title omitted]

PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI

Now comes First National Bank in Meridian, a corporation organized and existing under and by virtue of the laws of the United States of America and files this, its petition to remove the above entitled cause to the District Court of the United States for the Eastern Division of the Southern Dis-

[fol. 53] trict of the State of Mississippi and respectfully shows as follows:

1. That the principal of the amount involved exceeds the sum of $3,000.00 exclusive of interest and costs.

2. That the time to plead, answer or demur to this suit has not expired under the laws of the State of Mississippi.

3. That Lauderdale County, State of Mississippi, where the said suit is brought, is within the Eastern Division of the Southern District of the State of Mississippi, and that the defendant, First National Bank in Meridian, Mississippi, is domiciled and doing business in the Eastern Division of the Southern District of Mississippi.

4. That the said suit is a suit of a civil nature in equity, arising under the laws of the United States of America and is such a suit as the District Court for the Eastern Division of the Southern District of Mississippi has original jurisdiction thereof.

5. That it affirmatively appears from the original bill of complaint filed by the complainant against the defendant, that this is a suit of a civil nature in equity that arises under the Constitution and laws of the United States of America in this:

The complainant sues to recover taxes claimed to be due upon the shares of the capital stock, surplus and undivided profits of First National Bank of Meridian, a national banking corporation organized under the laws of the United States and domiciled and formerly doing business in Meridian, Mississippi, predicated upon certain assessments specifically set forth in the bill of complaint, made by the [fol. 54] taxing officers of the State of Mississippi, County of Lauderdale and City of Meridian for the year 1930, specifically alleging that such taxes by reason of certain facts alleged in the bill of complaint were due to have been paid and should have been paid by said First National Bank of Meridian prior to its becoming insolvent and being placed in the hands of a receiver by the Comptroller of the Currency of the United States.

The bill alleges that such First National Bank of Meridian became insolvent and was placed in the hands of a receiver without the payment of said taxes and claims that

said bank was due to have paid said taxes prior to such insolvency. Said First National Bank of Meridian which bank is alleged to have originally become liable for such taxes, is not made a party to this suit nor is the receiver of such bank. It affirmatively appears that the complainant without suing said First National Bank of Meridian or the receiver thereof, has by his bill, brought suit for such taxes against this defendant, First National Bank in Meridian, a national banking corporation organized and existing under the laws of the United States of America and domiciled and doing business in the City of Meridian and State of Mississippi, on the allegation and theory that said First National Bank in Meridian became liable to pay such taxes by virtue of the terms of a contract between this defendant and one, C. P. Rogers, the Receiver of the First National Bank of Meridian, made in the course of the liquidation and winding up of the affairs of First National Bank of Meridian, which contract is exhibited as Exhibit F to the bill of complaint and made a part of the bill of complaint.

From the bill of complaint and Exhibit F thereto, it affirmatively appears that the liability or not of the First National Bank of Meridian to pay such taxes as are claimed [fol. 55] by complainant turns upon the interpretation and application of Section 5219 and amendments thereof of the Revised Statutes of the United States of America; that the liability of the Receiver of the First National Bank of Meridian to pay such taxes out of the assets of First National Bank of Meridian in his hands for liquidation and the liability of such assets in the hands of the Receiver, turns upon the proper interpretation and application of Section 5219 and amendments thereto of the laws of the United States of America, and, also, upon the proper interpretation and application of the statutes and laws of the United States of America with reference to the winding up and liquidation of insolvent national banks; that the First National Bank in Meridian did not come into existence and was not organized until after First National Bank of Meridian had become insolvent without the payment of such taxes, nor until after C. P. Rogers had been appointed the receiver thereof, and that First National Bank in Meridian was organized for the purpose of purchasing of the Receiver of the First National Bank of Meridian in furtherance of such receiver's liquidation of the assets of First

National Bank of Meridian all the assets of such First National Bank of Meridian and that such purchase by First National Bank in Meridian of such assets of First National Bank of Meridian from the receiver thereof was pursuant to the written consent of the Comptroller of the Currency of the United States and an order of the United States District Court for the Eastern Division of the Southern District of Mississippi entered in such matter during the course of the liquidation of the affairs of the First National Bank of Meridian and the organization and opening the First National Bank in Meridian, and that whether or not First National Bank in Meridian is liable under the contract, Exhibit F to the bill of complaint, for such taxes further turns upon the proper interpretation and construction of [fol. 56] such contract under the laws of the United States of America pertaining to the assessment of the shares of the capital stock of national banks and pertaining to the winding up of and liquidation of insolvent national banks and pertaining to the organization and opening of new banks; that the nature and purpose of the complainant's suit as disclosed by the allegations thereof and the exhibits to the bill of complaint, is one wherein it is sought further to wind up and liquidate the affairs of the insolvent First National Bank of Meridian by making this defendant, which purchased the assets of the insolvent First National Bank of Meridian from the receiver thereof as aforesaid, respond by reason thereof, and out of the assets so purchased for the alleged taxes, which it is alleged that the insolvent First National Bank of Meridian should have paid before its insolvency; that by reason of all of the foregoing facts it affirmatively appears from the complainant's own pleadings that the suit is for the winding up and liquidation of the affairs of an insolvent national bank as against the purchaser and holder of its assets under a contract with the receiver of such insolvent bank, and is a suit of a civil nature that arises under the Constitution and laws of the United States of America and as such is removable by this defendant into the District Court of the United States for the Eastern Division of the Southern District of Mississippi.

6. Petitioner tenders and files herewith its bond with good and sufficient surety in the penalty of $500.00, conditioned as required by the statutes of the United States.

7. Written notice of said petition and bond for removal has been given to the complainant prior to filing the same.

Wherefore, petitioner prays that the Court may accept said petition and bond and may proceed no further in such [fols. 57 & 58] suit, but that the same may be removed to the said District Court of the United States, pursuant to the statutes of the United States in such cases made and provided, and petitioner will ever pray, etc.

Bozeman & Cameron, Wilbourn, Miller & Wilbourn,
Solicitors for Petitioner.

Duly sworn to by W. D. Cook. Jurat omitted in printing.

Bond on removal for $500.00, approved September 9, 1933, omitted in printing.

[fol. 59] In Chancery Court of Lauderdale County

[Title omitted]

Notice of Removal

To James B. Gully, State Tax Collector, and Messrs. Marshall W. Amis and J. C. Floyd, His Attorneys of Record:

Please take notice that the defendant, First National Bank in Meridian, will on or before the return day, to-wit: September 9, 1933, file their petition and bond for removal of this cause to the District Court of the United States in the proper district, to-wit: The Eastern Division of the Southern District of Mississippi.

Copies of said petition and bond are attached hereto.

This the 9th day of September, A. D. 1933.

Boseman & Cameron, Wilbourn, Miller & Wilbourn,
Attorneys for First National Bank.

We, the undersigned attorneys of record for James B. Gully, State Tax Collector, complainant, hereby acknowl-

edge receipt of the foregoing notice, together with copy of petition and bond, this the 9 day of September A. D. 1933.

Marshall W. Amis, J. C. Floyd, Attorneys for Complainant.

[fol. 60] In Chancery Court of Lauderdale County

[Title omitted]

Order of Removal

This day this cause came on to be heard before the Clerk on Rules Day, the second Monday and 11th day of September, 1933, on the petition of First National Bank in Meridian, to remove said cause to the District Court of the United States for the Eastern Division of the Southern District of Mississippi, and it appearing unto the Clerk that First National Bank in Meridian has filed proper petition on Saturday, September 9, 1933, for removal, with good and sufficient bond approved by the Presiding Judge, Chancellor A. B. Amis, Sr., with W. D. Cook and L. Rothenberg as sureties thereon, in the penalty of Five Hundred Dollars: and that notice of the filing of such petition and bond was served upon the attorneys for the plaintiff in said cause, together with a copy of the petition and bond attached thereto, and that their acceptance of service thereof is on file among the papers in this cause:

It is ordered, adjudged and decreed by the Clerk in vacation that this cause be and it is hereby removed into the District Court of the United States for the Eastern Division of the Southern District of the State of Mississippi; and that the Clerk certify and file a proper transcript thereof in said Court within thirty days of September 9, 1933.

Ordered, adjudged and decreed by the Clerk in vacation, this the 11th day of September, 1933.

Mack Cameron, Clerk of Chancery Court of Lauderdale County, Mississippi.

[fol. 61] Clerk's certificate to foregoing transcript omitted in printing.

NOTATION AS TO FILING OF TRANSCRIPT, ETC.

The transcript from the Lauderdale County Chancery Court was filed in the District Court within the time required by law, to wit, on September 30, 1933.

The defendant filed in the District Court cost bill from the Chancery Court of Lauderdale County, Mississippi, showing cost paid by it in the sum of $27.65.

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE SOUTHERN DISTRICT FOR MISSISSIPPI

IN Equity. No. 122

JAMES B. GULLY, State Tax Collector,

vs.

FIRST NATIONAL BANK IN MERIDIAN

NOTICE OF MOTION TO REMAND—Filed October 16, 1933

To Messrs. Wilbourn, Miller & Wilbourn and Bozeman & Cameron, Attorneys of Record for the First National Bank in Meridian:

You will take notice that the complainant, James B. Gully, State Tax Collector, has filed with the Clerk of said Court his motion to remand this cause to the Chancery [fol. 62] Court of Lauderdale County, Mississippi, a copy of said motion being hereto attached, and that the said motion will be called up for hearing before the Honorable Allen Cox, Judge of said Court, at Chambers in Baldwin, Mississippi at 9 o'clock, A. M. on Saturday, the 21st day of October, 1933.

Marshall W. Amis, J. C. Floyd, Attorneys for Complainant.

We hereby acknowledge service of the foregoing notice. This Oct. 16th, 1933.

Wilbourn, Miller & Wilbourn, by C. C. Miller, Bozeman & Cameron, by A. S. Bozeman, Jr.

IN UNITED STATES DISTRICT COURT

MOTION TO REMAND TO STATE COURT

Now comes the complainant, James B. Gully, State Tax Collector, by his attorneys, and appearing herein specially for sole and only purpose of this motion, moves the Court to remand this cause to the Chancery Court of Lauderdale County, Mississippi, and as grounds for said motion, says:

1st. He denies that the said suit is such a suit as the District Court for the Eastern Division of the Southern District of Mississippi would have original jurisdiction thereof.

2nd. He denies that it affirmatively appears from the original bill of complaint that this is a suit of a civil nature in equity that arises under the Constitution and the laws of the United States of America.

Marshall W. Amis, J. C. Floyd, Attorneys for Complainant.

[fol. 63] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION TO REMAND—Filed October 23, 1933

This day came on to be heard the motion of the *the* argument of counsel thereon, doth now hereby — this cause to the Chancery Court of Lauderdale County, State of Mississippi, and it appearing to the Court that notice of the hearing was duly given and that the parties appeared by their counsel, and the Court having heard and considered the said motion and the argument of counsel thereon, doth now hereby Order, Adjudge and Decree that the said motion to remand be and it is hereby overruled.

This the 21st day of October, 1933.

Allen Cox, Judge.

IN UNITED STATES DISTRICT COURT

ANSWER OF FIRST NATIONAL BANK IN MERIDIAN—Filed October 27, 1933

And now comes First National Bank in Meridian and for answer to so much of the original bill of complaint filed

[fol. 64] against it in this case as it is advised it is needful to answer, answering says:

1. It admits the allegations of paragraph 1 of the bill of complaint.

2. It admits the allegations of paragraph 2 of the original bill of complaint.

3. It admits the allegations of paragraph 3 of the bill of complaint in so far as it relates to the general powers of the City of Meridian. But it denies that the City of Meridian had any lawful authority to levy and collect the taxes which it did levy in this case against First National Bank of Meridian, which in this case, the plaintiff endeavors to collect.

4. It admits the allegations of paragraph 4 of the bill of complaint in so far as it relates to the general powers of the County of Lauderdale with reference to levying and collecting taxes upon the taxable property in the county, but it denies that the County of Lauderdale had any lawful authority to levy the tax against the First National Bank of Meridian which, it is now, by this bill, sought to collect.

5. It admits the allegations of paragraph 5 of the bill of complaint in so far as it relates to the general powers of Meridian Separate School District, but it denies that during the year 1930 said Meridian Separate School District was duly authorized to levy and collect the taxes which it is alleged in the bill of complaint it did levy against First National Bank of Meridian and which this bill seeks now to collect.

6. It admits the allegations of paragraph 6 of the bill of complaint.

[fol. 65] 7. This defendant specifically denies that during the year 1930 the said First National Bank of Meridian was subject to taxation by the State of Mississippi, by the County of Lauderdale, by the City of Meridian and by the Meridian Separate School District upon its capital stock, surplus and undivided profits in the manner provided by the laws of the State of Mississippi, and the charter and ordinances of the said city.

8. It denies that the purported assessment against First National Bank of Meridian for state and county taxes for

the year 1930 purporting to be upon page 12 of the personal assessment roll of Lauderdale County for the year 1930 and specifically set out in paragraph 8, was made in strict compliance with the laws of the State of Mississippi. It denies that the laws of the State of Mississippi authorize the making of such assessment. It denies that said assessment has any validity whatever and sets up that such assessment was not only invalid and contrary to the laws of the State of Mississippi, and to the laws of the United States, Section 5219 of the Revised Statutes of the United States, but shows that such assessment was excessive and that said property had no such value as the said assessment purported to show.

9. It admits the allegations of paragraph 9 of the bill of complaint.

10. It admits the allegations of paragraph 10 of the bill of complaint. It shows, however, that none of the acts alleged to have been done in paragraphs 9 and 10 of the bill of complaint and neither of the orders exhibited in connection with paragraph 10 of the bill of complaint were effective to make legal the aforesaid void and excessive assessment purported to have been made against First National Bank of Meridian.

[fol. 66] 11. It admits the allegations of paragraph 11 of the bill of complaint, but avers that nothing therein set forth, and nothing in Exhibit "B" attached thereto, had the effect to make legal the void and excessive assessment purported to have been made against First National Bank of Meridian as set forth in paragraph 8 of the bill of complaint.

12. It admits the allegations of paragraph 12 of the bill of complaint, but avers that nothing therein contained and nothing set forth in Exhibit "C" thereto could or did make legal and valid the unlawful and void assessment purported to have been made against First National Bank of Meridian, set forth in paragraph 8 of the bill of complaint.

13. It admits the allegations of paragraph 13 of the bill of complaint, but avers that nothing therein contained could or did make legal and valid the unlawful and void assess-

ment purported to have been made against First National Bank of Meridian, set forth in paragraph 8 of the bill of complaint.

14. It denies that by reason of the allegations contained in the first thirteen paragraphs of the bill of complaint or by reason of any other facts or circumstances, there became due the State of Mississippi the sum of $4,321.08 as taxes for the year 1930 against said capital stock, surplus and undivided profits of said First National Bank of Meridian. It shows that the alleged assessment and levy of such tax was absolutely null and void and in violation of the laws of the State of Mississippi and the statutes of the United States, especially Section 5219 of the Revised Statutes of the United States, and that in addition to being void, such tax was, also, excessive in that said capital stock, surplus and undivided profits of the said First National Bank of Meridian were not of the value fixed upon them in and by such void assessment.

[fol. 67] 15. It denies that by reason of the allegations contained in the first thirteen paragraphs of the bill of complaint or by reason of any other facts or circumstances, there became due the County of Lauderdale the sum of $8,642.16 as taxes for the year 1930 against said capital stock, surplus and undivided profits of said First National Bank of Meridian. It shows that the alleged assessment and levy of such tax was absolutely null and void and in violation of the laws of the State of Mississippi and the statutes of the United States, especially Section 5219 of the Revised Statutes of the United States, and that in addition to being void, such tax was, also, excessive in that said capital stock, surplus and undivided profits of the said First National Bank of Meridian were not of the value fixed upon them in and by such void assessment.

16. The defendant denies that the taxes alleged to be due the State of Mississippi and the County of Lauderdale in the 14th and 15th paragraphs of the bill of complaint were due by the shareholders of the said First National Bank of Meridian, and denies that the First National Bank of Meridian was by law liable to pay said taxes as the agent of each of its shareholders, and was authorized to pay same out of their individual profit account, or to charge same to their expense account, or to any other account

which the shareholders might have with said bank, all in proportion to their ownership. This defendant shows that said assessment did not conform to the law of the State of Mississippi, nor to the laws of the United States, in that it does not purport to be and was not in fact, an assessment against the shareholders of the said First National Bank of Meridian. Defendant avers further that said assessment violated both the laws of the State of Mississippi and the laws of the United States, in that on its face, it purports to be not an assessment against the shareholders but a direct [fol. 68] assessment against the First National Bank of Meridian. Defendant further states that the said assessment was further excessive in that the said capital stock, surplus and undivided profits of the said first National Bank of Meridian did not have the value alleged in said assessment.

17. Defendant denies the allegation that under the law, the said taxes were due the State of Mississippi and the County of Lauderdale and became and were debts due by the several shareholders of the First National Bank of Meridian to the State of Mississippi and the County of Lauderdale.

18. Defendant denies that it became and was the duty of the First National Bank of Meridian to pay the amount of said taxes to the Sheriff and Tax Collector of Lauderdale County on or before the 1st day of December, 1930 and to charge same to the individual profit accounts of its said shareholders or expense accounts or any other accounts said shareholders might have with said bank.

19. This defendant submits that the allegations of the 19th paragraph of the bill of complaint are too vague, indefinite and uncertain to call for answer by this defendant, and that this defendant is not charged with knowledge or with any duty to know what sums of money or dividends or deposits were at any time in the possession of the First National Bank of Meridian due to its shareholders during the period from January 1, 1930 to January 13, 1931.

This defendant, however, is informed and believes that a great majority of the shareholders of the First National Bank of Meridian did not have any deposits whatever with said bank during the period from January 1, 1930 to Janu- [fol. 69] ary 13, 1931, and this defendant denies that on

January 13, 1931, the said First National Bank of Meridian had in its possession either dividends or money on deposit in said bank belonging to the shareholders thereof, and denies that it had any funds in its possession or under its control on January 13, 1931, the day the said bank suspended business as a going concern, which were due to the shareholders of said bank, or which were in any sense liable on any theory to be paid out as taxes for such shareholders, and denies that there was any liability of the shareholders on such alleged taxes and denies there was any liability on said First National Bank of Meridian as to such taxes and denies there was any authority or right or duty in the First National Bank of Meridian to pay the alleged unlawful taxes alleged to be due by the shareholders of such institution. This defendant denies that any taxes had been lawfully assessed and levied against the shareholders of said First National Bank of Meridian for the year 1930.

20. The defendant denies that it was the duty of the First National Bank of Meridian to pay the sum of $12,963.24 to the Sheriff and Tax Collector of Lauderdale County on or before December 1, 1930, out of the funds and moneys of its shareholders then and theretofore in its possession, and denies that it had, on or before December 1, 1930, in its possession any funds of its shareholders which it had any right to pay to the said Sheriff and Tax Collector of Lauderdale County. It admits the First National Bank of Meridian wholly failed, neglected and refused to pay said taxes and submit that in so doing, it acted properly and correctly. It denies that First National Bank of Meridian became and was liable and indebted directly and primarily unto the State of Mississippi and County of Lauderdale for the full amount of said taxes in the sum of $12,963.24 or any part thereof.

[fol. 70] 21. It admits that the City Tax Assessor and Collector of the City of Meridian assessed the capital stock, surplus and undivided profits of the First National Bank of Meridian claimed and alleged to be due the City of Meridian and to the Meridian Separate School District for the year 1930 as set up and claimed in paragraph 21 of the bill of complaint. But it denies that in so doing, the City of Meridian proceeded according to law. It denies that the City of Meridian had any lawful authority to make such

assessment. It denies that said assessment was a legal assessment. It denies that said assessment was authorized by any law of the State of Mississippi or any charter provisions of the City of Meridian or any authority conferred by statute upon the Meridian separate School District, or by virtue of any law of the United States, but on the contrary avers that said assessment was wholly null and void in that it specifically violated Section 5219 of the Revised Statutes of the United States, and is in direct conflict with the statutes of the State of Mississippi. This defendant, also, shows that said assessment is excessive and that said capital stock, surplus and undivided profit sought to be assessed in such alleged assessment, had no such value as is therein described to them and that there was no liability for the alleged claimed taxes set up in said paragraph 21 of the bill of complaint amounting to $13,504.75 or any part thereof.

22. It admits the allegations of the 22nd paragraph of the bill of complaint but shows that nothing therein contained could possibly have the effect to validate the void assessment purported to have been made and set forth in paragraph 21 of the bill of complaint.

23. It admits the allegations of the 23rd paragraph of the bill of complaint but shows that nothing therein contained could possibly have the effect to validate the void assess-
[fol. 71] ment purported to have been made and set forth in paragraph 21 of the bill of complaint.

24. It admits the allegations of the 4th paragraph of the bill of complaint but shows that nothing therein contained could possibly have the effect to validate the void assessment purported to have been made and set forth in paragraph 21 of the bill of complaint.

25. It admits the allegations of the 25th paragraph of the bill of complaint but shows that nothing therein contained could possibly have the effect to validate the void assessment purported to have been made and set forth in paragraph 21 of the bill of complaint.

26. This defendant denies that by reason of the allegations of the bill of complaint in paragraphs 21 to 25, inclusive, or by reason of any other facts or circumstances alleged in the bill of complaint, there became due to the

City of Meridian the sum of $8,102.85 as taxes for the year 1930 against the capital stock, surplus and undivided profits of said First National Bank of Meridian. It denies that anything contained in paragraphs 21 to 25, inclusive, of the bill of complaint could validate the manifestly void assessment set forth in the 21st paragraph of the bill of complaint. It submits that said assessment was not in accordance with any law of the State of Mississippi and was not an assessment against the shareholders of the First National Bank of Meridian and it was for that reason wholly null and void. It submits that said purported assessment was directly against the First National Bank of Meridian for which there was no warrant in either the state or the national law and which was in violation of the state statutes and of Section 5219 of the Revised Statutes of the United States. It submits that said assessment was excessive and illegal, also, in that the value therein ascribed [fol. 72] to such capital stock, surplus and undivided profits was incorrect and it had no such value.

27. This defendant denies that by reason of the allegations of the bill of complaint in paragraphs 21 to 25, inclusive, or by reason of any other facts or circumstances alleged in the bill of complaint, there became due to the Meridian Separate School District the sum of $5,401.90 as taxes for the year 1930 against the capital stock, surplus and undivided profits of said First National Bank of Meridian. It denies that anything contained in paragraphs 21 to 25, inclusive, of the bill of complaint could validate the manifestly void assessment set forth in the 21st paragraph of the bill of complaint. It submits that said assessment was not in accordance with any law of the State of Mississippi and was not an assessment against the shareholders of the First National Bank of Meridian and it was for that reason wholly null and void. It submits that said purported assessment was directly against the First National Bank of Meridian for which there was no warrant in either the state or the national law and which was in violation of the state statutes and of Section 5219 of the Revised Statutes of the United States. It submits that said assessment was excessive, and illegal, also, in that the value therein ascribed to such capital stock, surplus and undivided profits was incorrect and it had no such value.

28. It denies that said taxes were due to the City of Meridian and the Meridian Separate School District by the shareholders of the First National Bank of Meridian. It denies that the First National Bank of Meridian was by law and the charter amendments and ordinances of the City of Meridian, liable to pay said taxes as the agent of its shareholders, or was authorized to pay same out of their individual profit account, or to charge same to their [fol. 73] expense account or to any other account which said shareholders might have with said bank, all in proportion to their ownership. It denies that any such liability ever arose on the part of First National Bank of Meridian or existed at any time. It denies that either the shareholders of said bank, or said bank owed such taxes or any part thereof.

29. It denies that under the law, the charter amendments, and ordinances of the City of Meridian, the taxes due the City of Meridian and Meridian Separate School District either became, or were, debts due by the shareholders of First National Bank of Meridian to the City of Meridian and Meridian Separate School District.

30. It denies that it either became, or was, the duty of First National Bank of Meridian to pay the amount of said taxes alleged to be due the City of Meridian and the Meridian Separate School District to the City Tax Assessor and Collector, on or before December 1, 1930, or at all, and denies it was the duty of said bank to charge the same to the individual profit accounts of its said shareholders, or to their expense accounts, or to any other accounts said shareholders might have had with said bank.

31. This defendant submits that the allegations of the 31st paragraph of the bill of complaint are too vague, indefinite and uncertain to call for answer by this defendant, and that this defendant is not charged with knowledge or with any duty to know what sums of money or dividends or deposits were at any time in the possession of the First National Bank of Meridian due to its shareholders during the period from January 1, 1930 to January 13, 1931.

This defendant, however, is informed and believes that a great majority of the shareholders of the First National [fol. 74] Bank of Meridian did not have any deposits what-

ever with said bank during the period from January 1, 1930, to January 13, 1931, and this defendant denies that on January 13, 1931, the said First National Bank of Meridian had in its possession either dividends or money on deposit in said bank belonging to the shareholders thereof, and denies that it had any funds in its possession or under its control on January 13, 1931, the day the said bank suspended business as a going concern, which were due to the shareholders of said bank, or which were in any sense liable on any theory to be paid out as taxes for such shareholders, and denies that there was any liability of the shareholders on such alleged taxes and denies that there was any liability on said First National Bank of Meridian as to such taxes and denies there was any authority or right or duty in the First National Bank of Meridian to pay the alleged unlawful taxes alleged to be due by the shareholders of such institution. This defendant denies that any taxes had been lawfully assessed and levied against the shareholders of said First National Bank of Meridian for the year 1930.

32. The defendant denies that it was the duty of the First National Bank of Meridian to pay the sum of $13,504.75 to the City Tax Assessor and Collector of the City of Meridian on or before December 1, 1930, out of the funds and monies of its shareholders then and theretofore in its possession, and denies that it had, on or before December 1, 1930, in its possession any funds of its shareholders which it had any right to pay to the said City Tax Assessor and Collector of the City of Meridian. It admits the First National Bank of Meridian wholly failed, neglected and refused to pay said taxes and submits that in so doing, it acted properly and correctly. It denies that First National Bank of Meridian became and was liable and indebted directly and primarily unto the City of Meri- [fol. 75] dian and the Meridian Separate School District for the full amount of said taxes in the sum of $13,504.75, or any part thereof.

33. It admits the allegations of paragraph 33 of the bill of complaint. It shows that the active receivership of the First National Bank of Meridian was closed by the Comptroller of the Currency on the — day of ——, 19—, long prior to the filing of this suit against this defendant.

34. It admits the allegations of the 34th paragraph of the original bill of complaint.

35. It admits the allegations of paragraph 35 of the bill of complaint and shows that the contract, Exhibit "F" therein referred to was dated the 4th day of June, 1931.

36. This defendant denies that by the terms of the contract, Exhibit "F" to the bill of complaint, this defendant, First National Bank in Meridian assumed and became liable for all of the debts and liabilities of the First National Bank of Meridian, including among others, its debt and liability for all of the taxes hereinbefore mentioned. It denies that it made any commitments or entered into any agreements in and by such contract, whereby it obligated itself to pay the alleged taxes herein sued for, or any part thereof. It denies that such contract is susceptible of any such interpretation. It denies that First National Bank of Meridian had any such debt or liability for the taxes herein sued for, and expressly denies that in and by the contract, Exhibit "F", it agreed and obligated it[illegible]o pay same.

37. This defendant denies that it is under obligation to pay the taxes herein sued for or any part thereof, but admits that it has not paid them.

[fol. 76] 38. It admits the allegations of paragraph 38 of the bill of complaint in so far as it alleges the non-payment of the alleged taxes, but denies that part of the allegations of paragraph 38 of the bill of complaint wherein it is charged that said taxes remain past due. It denies that said taxes were ever due at any time.

39. It denies that a committee composed of Levi Rothenberg, F. J. Hughes and J. M. Wilson, acting for the use and benefit of said First National Bank in Meridian, purchased of and from all of the shareholders of the First National Bank of Meridian their several shares of stock, as alleged in paragraph 39 of the bill of complaint, but admits, however, that certain of the shareholders of the First National Bank of Meridian did transfer and assign unto the said Levi Rothenberg, F. J. Hughes and J. M. Wilson, as a committee, their shares of stock in the old First National Bank of Meridian, after it had suspended business and that the form of such assignment was, and

is, as shown in and by Exhibit "H" to the bill of complaint. It denies, however, that such form of assignment constitutes an assumption on the part of First National Bank in Meridian of any taxes, if any, due by the shareholders of the old First National Bank of Meridian. It denies that the shareholders then owed any such taxes or were liable for any such taxes.

40. It denies that there was any purchase and sale to this defendant of the shares of stock of the shareholders of the old First National Bank of Meridian. It denies that such shares of stock had any value whatever at the time of the transfers thereof to this defendant. It admits that such transfers were evidenced by written instruments in the form of Exhibits "H" and "I" to the bill of complaint, but it denies that such instruments are contracts of purchase and sale within the meaning of the law and [fol. 77] denies that such instruments constitute an assumption of any taxes that might be due, if any, by the shareholders of the old First National Bank of Meridian.

41. It admits that the First National Bank in Meridian was duly organized and began business on June 12, 1931. It admits that it ratified and confirmed the acts of the committee in taking over the transfer of the shares of stock of the old First National Bank of Meridian but denies that such transfers of such stock were contracts of purchase and sale and denies that the acts of the committee so ratified and confirmed by this defendant, had the effect, and were of the nature and meaning ascribed to them in the bill of complaint, and it expressly denies that this defendant did thereby assume and undertake to discharge any and all liabilities of every kind imposed by statute upon the shareholders of the First National Bank of Meridian by reason of their ownership of said shares and expressly denies that among such liabilities so alleged to have been assumed was, and is, the liability to pay the taxes to the State of Mississippi, County of Lauderdale, City of Meridian and Meridian Separate School District herein sued for. It denies that there was any liability for said taxes on the part of either the shareholders of First National Bank of Meridian or of First National Bank of Meridian.

42. It admits that the various acts of the Legislature and charter amendments listed in paragraphs lettered from

"A" to "CC", inclusive, exist. But denies that such charter, charter amendments and ordinances of the City of Meridian constitute authority for the making of the alleged assessment and tax levy by the City of Meridian and the Meridian Separate School District as set forth in paragraph 21 of the bill of complaint. This defendant submits that such charter, charter amendments and ordinances are [fol. 78] null and void in that they in no way conform to the provisions of Section 5219 of the Revised Statutes of the United States and in that they do not confer the authority to make the alleged assessment herein set up as the predicate for the collection of the taxes herein claimed, for and on behalf of the City of Meridian and the Meridian Separate School District and denies the legality, validity and binding effect of all of such charter, charter amendments and acts of the Legislature pertaining to the City of Meridian as in any way authorizing or validating the alleged assessment and the alleged levy of said taxes as against the said First National Bank of Meridian.

43. This defendant further sets up, shows unto the Court, and pleads that the alleged taxes, alleged to be due to the State of Mississippi, County of Lauderdale, City of Meridian and Meridian Separate School District, and herein sought to be recovered, are illegal, and void and uncollectible, in that the amendment and tax levy thereof violate Section 5219 of the Revised Statutes of the United States as amended in this:

That the said taxes herein sued for were all sought to be imposed in and by the alleged assessment and levy thereof upon the shares of the capital stock of the First National Bank of Meridian, a national banking institution, organized under the laws of the United States, domiciled and doing business in the City of Meridian at a greater rate of taxation than is, or was, then assessed and levied upon other monied capital in the hands of individual citizens of the State of Mississippi, coming into competition with the business of national banks, for the reasons as follows, to-wit:

As of January 1, 1930, and for a number of years prior thereto and ever since upwards of ten million dollars of monied capital in the hands of individual citizens of the [fol. 79] State of Mississippi, coming into competition with the business of national banks, was actually employed and

engaged in an investment business in competition with the business of national banks. That such monied capital in the hands of individual citizens of the State of Mississippi, so employed and engaged in business in competition with the business of national banks was being actively employed and engaged in such business in competition with national banks all over the State of Mississippi on, prior and since January 1, 1930, the effective date of assessments for personal taxes against property owners in the State of Mississippi. That a large quantity of such monied capital, approximately, two million dollars in amount, was then and there, on, prior to and since January 1, 1930, actually engaged and employed in competition with the business of national banks in Meridian and Lauderdale County and the vicinity thereof and within the trade territory wherein First National Bank of Meridian was then and there engaged in the banking business. That the aforesaid large amounts of monied capital so employed and engaged in business in competition with national banks was so employed and engaged in such business by individual citizens and persons carrying on an investment business and did not merely represent personal investments of the individual owners thereof; that such monied capital was actually being invested then and there, on and prior and since January 1, 1930, in the trade territory of First National Bank of Meridian and in the State of Mississippi in active competition with the business of national banks in the making of numerous loans and investments such as are ordinarily and customarily made by national banks in the carrying on of their business, and were made at a rate of interest not exceeding the sum of 6% and such monied capital so employed and engaged in active competition with national banks was so employed as that all of it was then and there by virtue of the [fol. 80] statutes of the State of Mississippi, by reason of the rate of interest not being in excess of the rate of 6%, exempt from any and all taxes whatsoever. The statutes of the state of Mississippi specifically exempts such monied capital in and by paragraph "V" of Section 3108 of the Code of 1930, such paragraph reading as follows:

"(x) All state, county, municipal, levee, drainage and all school bonds or other government obligations and all bonds and/or evidences of debt issued by any church or church organization of this state, and all notes and evidences of in-

debtedness bearing a rate of interest not greater than six per cent per annum, and all money loaned at a rate of interest not exceeding six per cent per annum; and all stocks in or bonds of foreign corporations or associations shall be exempt from all ad valorem taxes."

That said section of the code so exempting such moneyed capital was in force as of January 1, 1930, and for a number of years prior thereto, and has been since. That the effect of it has been to encourage and build up the employment of large amounts of monied capital in the State of Mississippi in business in competiton with the business of national banks. That numerous persons were, as of January 1, 1930, before and since, actively engaged in the State of Mississippi in employing moneyed capital in the purchase of bonds, notes and evidences of indebtedness and the making of loans in competition with the business of national banks at a rate of interest of 6% thereby gaining and claiming under the terms of the statutes of the State of Mississippi an exemption from any and all taxes, whereas, the laws of the State of Mississippi at the same time, Section 3138 thereof, provided for the assessment of the monied capital employed in the banking business and shares of stock in national banks at a much higher rate, all [fol. 81] as provided in Section 3138 of the Code of 1930, such section reading as follows:

"3138. Banks—how taxed.—The president, cashier or other officer having like duties, of each bank or banking association in this state, existing by the laws of this state, shall deliver on or before the first day of April of each year to the assessor of taxes of the county in which it is located, a statement on the form prescribed by the state tax commission under oath, of the number and amount of all the shares of its capital stock paid in, or if it be not a corporation or joint stock company, then the amount of its capital, and of the sum of all undivided profits or surplus or accumulation of any sort constituting part of the assets of the bank, excluding its real estate; and the value of such shares estimated at par and increased by the proportion of the par value of all the shares of stock to the said surplus fund or accumulation, or of the amount of its capital so increased, shall be the basis of the taxation of such shares to the bank or of the capital to the owner thereof in case the

bank be not a corporation or joint stock company, and the taxes levied on such bank or banking association shall be a first lien on its assets, but if the shares of such bank or banking association are of less value than par, they shall be valued accordingly. Provided, nevertheless, in case of such bank or banking association existing under the laws of the United States, a precisely similar amount shall be assessed upon and collected from the shareholders thereof at the domicile of the bank as would have been assessed upon and collected from the said bank had it been created under the laws of the state of Mississippi; but each said bank and banking association shall, nevertheless, be liable to pay any taxes as the agent of each of its shareholders, and may pay the same out of their individual profit account, or charge the same to their expense account or to the account of such shareholder in proportion to their ownership."

[fol. 82] That in and by the laws of the State of Mississippi, corporations and joint stock companies, other than banks, are taxed pursuant to section 3136 of the Code of 1930 of the State of Mississippi, such section reading as follows:

"3136. Corporations and joint stock companies, how taxed.—The property of each corporation or joint stock company (whether organized under the laws of this state or any other state or country) shall be assessed and taxed as that of a person; and the laws, providing for the assessment and collection of taxes on the property of persons, shall apply to the assessment and collection of taxes on the property of corporations and joint stock companies; and all shares or certificates of stock issued by any such corporation or joint stock company shall be exempt from taxation and shall not be returned for assessment. The president, secretary or other officer of the same shall render, under oath, the tax list, in its name, of its property real or personal or both subject to taxation, to the assessor at the same time that persons are required to render their assessments of their property. Its land and tangible personal property shall be assessed and taxed where situated on the first day of January of the year; and the accounts, notes, bonds, shares or certificates of stock, bank deposits, rights, money or other intangible property subject to taxation owned by a corporation or joint stock company organized

under the laws of this state shall be assessed and taxed at its domicile; but any such intangible personal property, which would be exempt from taxation according to law, if owned by a person shall be exempt from taxation when owned by a corporation or joint stock company and shall not be returned for assessment. Such intangible personal property owned by a corporation or joint stock company organized under the laws of any state or country other than Mississippi shall be exempt from taxation and shall not be [fol. 83] returned for assessment. This section shall not apply to persons, firms or corporations assessed by the state railroad assessors or domestic insurance companies; but the shares or certificates of stock issued by a railroad, sleeping car, express, telephone or telegraph company or a freight car line or a railroad equipment company or a domestic insurance company, shall be exempt from taxation in the hands of the stockholder and shall not be returned for taxation by such stockholder."

That the aforesaid quoted provisions of the laws of the State of Mississippi in Sections 3108, 3136 and 3138 of the Code of 1930, were all in effect on January 1, 1930, and before and since. That in and by Section 3136 of the Code of 1930, no corporation or joint stock company nor individual was taxable at all on any notes, bonds, evidences of indebtedness, choses in action not bearing a rate of interest greater than six per centum and all corporations and joint stock companies in making return for taxes of their property were entitled to treat as exempt all that portion of their capital invested in notes, bonds, evidences of indebtedness and choses in action which did not bear a rate of interest in excess of six per centum. That as a result of the provisions of the taxing laws of the State of Mississippi and the exemptions from taxes under the laws of the State of Mississippi and the practices of the taxing authorities of the State of Mississippi, enormous sums of moneyed capital, exceeding ten millions of dollars in amount, employed in competition with the business of national banks was not required to bear any of the burden of the taxation; whereas, the same laws sought to discriminate against moneyed capital and the shares of stock of national banks by an effort to assess them pursuant to the terms of Section 3138 of the Code of 1930. That as a

result thereof, there has been a violation of the provisions [fol. 84] of Section 5219 of the Revised Statutes of the United States as amended, in attempting to tax, under the laws of the State of Mississippi, the shares of stock of national banks at a greater rate than other capital in the hands of citizens of the state employed in competition with the national banks are taxed. That such effort to tax said shares of capital stock is, therefore, discriminatory and violative of said statutes of the United States and void and that by reason thereof, the attempted assessment of the shares of the capital stock of First National Bank of Meridian is not only void for the reasons herein first set forth in that it does not conform either to the laws of the State of Mississippi or of the United States, but that it is, also, discriminatory and void in that it expressly and definitely, for the reasons alleged in this paragraph, discriminates contrary to the statutes of the United States against the moneyed capital employed in the business of national banks and in favor of moneyed capital employed in the State of Mississippi in competition with the business of national banks.

And now having fully answered, this defendant denies that any such taxes as are sued for, were or are due either by the shareholders of the First National Bank of Meridian, or by the First National Bank of Meridian, or by the Receiver of First National Bank of Meridian, and shows that the assessment and levy of such taxes herein sought to be enforced were wholly null and void and defendant states that it is not, and never has been, liable to pay the said taxes or any part thereof.

MOTION TO DISMISS

And now having fully answered, the defendant moves to dismiss the bill of complaint and for grounds, states the following:

1. It affirmatively appears on the face of the bill of complaint that the alleged assessment for taxes, alleged therein [fol. 85] to have been made upon page 12 of the Personal Assessment Roll of Lauderdale County, State of Mississippi, for the year 1930, was and purports to be, an assess-

ment made directly against First National Bank of Meridian and not against the stockholders thereof; and that such assessment is null and void on the face thereof, because it violates Section 5219 of the Revised Statutes of the United States and the amendments thereto, with reference to the assessment of the shares of stock of national banks.

2. It affirmatively appears on the face of the bill of complaint that the alleged assessment for the year 1930, alleged to have been made by the City of Meridian against First National Bank of Meridian was, and is, a direct assessment against First National Bank of Meridian and not against the shareholders thereof; and was, and is, null and void, because in violation of the provisions of Section 5219 of the Revised Statutes of the United States and the amendments thereto.

3. It affirmatively appears that the taxes sought to be recovered in this cause were originally assessed and levied by the state, county and municipality, not against the shareholders of First National Bank of Meridian, but as against First National Bank of Meridian; and that such taxes were levied upon the First National Bank of Meridian direct, measuring them by the alleged value of its shares of capital stock, surplus and undivided profits, and such assessment and levy of such taxes are, on the face thereof, null and void under the provisions of Section 5219 of the Revised Statutes of the United States as construed by the Supreme Court of the United States in the case of First National Bank of Gulfport, Mississippi, v. Adams, State Tax Collector, 258 U. S. 361, 66 L. Ed. 661.

[fol. 86] 4. It affirmatively appears on the face of the bill of complaint, that the taxes levied and assessed against First National Bank of Meridian, and here sought to be collected of this defendant, were void because in contravention of the Statutes of the United States.

5. It affirmatively appears that recovery of such void taxes from and of the defendant, First National Bank in Meridian, is predicated, not upon any assessment and levy of such taxes as against the defendant, First National Bank in Meridian, but upon the theory that said taxes, though

not assessed against the shareholders of First National Bank of Meridian, were, nevertheless, a debt of the shareholders of First National Bank of Meridian, which First National Bank of Meridian ought to have paid prior to the receivership; and that defendant, First National Bank in Meridian, in and by its purchase of the assets of First National Bank of Meridian from the Receiver of such bank, with the written consent of the Comptrol-er of the Currency, and pursuant to an order of the United States District Court for the Eastern Division of the Southern District of the State of Mississippi, assumed the payment of such taxes. But the contract between the defendant bank and the said Receiver of First National Bank of Meridian, Exhibit "F" to the original bill of complaint, rightly understood and construed, clearly and affirmatively shows that the defendant bank did not assume payment of sush obligation, for the following reasons:

a. Said liability did not exist as against First National Bank of Meridian.

b. It affirmatively appears that the Receiver of First National Bank of Meridian was not, at the time of the making of the contract with defendant, First National Bank in Meridian, liable for said taxes or any part thereof.

[fol. 87] c. It affirmatively appears that the claim for said taxes was not a recognized liability of either First National Bank of Meridian or the Receiver thereof, at the time this defendant bank purchased the assets from the Receiver of First National Bank of Meridian; and it, also, affirmatively appears that it was not a claim or liability established during the active receivership of First National Bank of Meridian.

d. It affirmatively appears on the face of the bill of complaint that the taxes for which this suit was brought were not assumed in and by the purchase of said assets by First National Bank in Meridian, the defendant herein.

e. It affirmatively appears from the said contract, Exhibit "F" to the bill of complaint, that this defendant did not assume liability of such taxes.

f. It does not appear that the taxes sued for constituted such a claim as the Receiver, under the contract, Exhibit

"F", had a right to call upon this defendant bank to furnish funds to pay.

g. It affirmatively appears that plaintiff was not a party to such contract and that it was not made for his benefit.

6. It affirmatively appears that there is no liability upon the defendant bank arising under the contract, Exhibit "H" to the original bill of complaint, for the reasons:

a. That said alleged liability is not covered by the contract, Exhibit "H."

b. The alleged liability is not assumed by the contract, Exhibit "H."

[fol. 88] v. The contract, Exhibit "H," is, at most only a contract of indemnity and not such a contract as can be sued on directly by the complainant.

d. The plaintiff is not a party to such contract and it was not made for his benefit.

7. There is no right of recovery shown in the bill of complaint.

Respectfully submitted, Bozeman & Cameron, Wilbourn, Miller & Wilbourn, Attorneys for Defendant.

Duly sworn to by W. D. Cook. Jurat omitted in printing.

[fol. 89] IN UNITED STATES DISTRICT COURT

MOTION FOR LEAVE TO AMEND BILL OF COMPLAINT—Filed March 20, 1934

And now comes James B. Gully, State Tax Collector, complainant in the above captioned cause, by his attorneys, and files herewith his motion to be allowed to amend the original bill filed herein by making as additional party defendants thereto the following named parties, to-wit: First National Bank of Meridian, Louis G. Selig, Receiver of said First National Bank of Meridian, J. G. Repsher, Marshall Loeb, and W. W. Willis, and by adding other averments to the original bill as shown by the proposed amendment exhibited herewith to the Court.

The Complainant would show that he is advised and believes that said amendment is material to this cause and is necessary in order to get all proper and necessary parties before the Court in order that the Court can do full and complete justice between the parties in rendering a final decree herein.

Wherefore, Premises Considered, the complainant makes this his motion to be allowed to make the amendment to the bill of complaint as above indicated.

Respectfully submitted, Marshall W. Amis, J. C. Floyd, Special Attorneys for James B. Gully, State Tax Collector.

[fol. 90] IN UNITED STATES DISTRICT COURT

AMENDMENT TO BILL OF COMPLAINT

Now comes the complainant, James B. Gully, State Tax Collector, by his attorneys, and by leave of Court first had and obtained, files this his amendment to the original bill of complaint in this cause, to-wit:

A. Complainant names as additional defendants to said bill of complaint the following parties, to-wit: First National Bank of Meridian, Louis G. Selig, Receiver of said First National Bank of Meridian, J. G. Repsher, Marshall Loeb, and W. W. Willis.

B. Complainant charges that the defendant, First National Bank of Meridian, is a national banking association organized and existing under the laws of the United States of America and domiciled in the City of Meridian, Lauderdale County, Mississippi.

C. Complainant charges that the defendant, Louis G. Selig, is the duly appointed, qualified and acting receiver of said First National Bank of Meridian under appointment by the Comptroller of the Currency of the United States.

D. Complainant charges that the defendants, J. G. Repsher, Marshall Loeb and W. W. Willis, are each and all resident citizens of the City of Meridian, Lauderdale County, Mississippi.

E. Complainant reiterates and re-affirms all of the allegations as set forth in paragraphs numbered from 1 to 42, both inclusive, of his original bill of complaint the same as [fol. 91] if fully re-copied here, and, adding further paragraphs to be numbered from 43 to 44 inclusive, charges and says:

43rd. That pursuant to the provisions of the contract for the sale of the assets of the First National Bank of Meridian, Exhibit "F" to the original, and the provisions of the creditors agreements referred to in said contract, Exhibit "F," the defendant First National Bank in Meridian did in due course set aside, convey and deliver unto the defendants J. G. Repsher, Marshall Loeb and W. W. Willis as Trustees, certain of the assets of said First National Bank of Meridian of the par or book value of approximately $1,250,000.00 to be held, collected, liquidated and administered by said Trustees for the benefit first of the creditors of said First National Bank of Meridian, and second of the shareholders of said First National Bank of Meridian, as set forth in said contract, Exhibit "F."

44th. That said Trustees have not fully administered said trust but are still engaged therein and have certain of said assets, the exact amount and nature of which are unknown to your complainant, still in their possession, and that the interest of the shareholders of said First National Bank of Meridian in said assets is liable in the hands of said Trustees to the payment of the taxes hereinbefore set forth.

Premises Considered, your complainant prays that the said First National Bank in Meridian, First National Bank of Meridian, Louis G. Selig, Receiver of the First National Bank of Meridian, J. G. Repsher, Marshall Loeb and W. W. Willis be made parties defendant to this bill of complaint and required to plead, answer or demur thereto, and that upon a final hearing hereof a personal decree may be entered in favor of your complainant and against said First [fol. 92] National Bank in Meridian, First National Bank of Meridian, and Louis G. Selig, Receiver of the First National Bank of Meridian, for all of the taxes aforesaid, to-wit: Four Thousand Three Hundred Twenty-one and 08/100 Dollars for the use and benefit of the State of Mis-

sissippi; Eight Thousand Six Hundred Forty-two and 16/100 Dollars for the use and benefit of the County of Lauderdale in said State of Mississippi; Eight Thousand Six Hundred Forty-two and 16/100 Dollars for the use and benefit of the County of Lauderdale in said State of Mississippi; Eight Thousand One Hundred Two and 85/100 Dollars for the use and benefit of the City of Meridian in said State; and Five Thousand Four Hundred One and 90/100 Dollars for the use and benefit of the Meridian Separate School District in Lauderdale County, in said State, all with interest thereon at the rate of Six per centum per annum from the 1st day of December, A. D. 1930, until paid, and all costs of this proceeding; and that all the right, title and interest of the shareholders of the First National Bank of Meridian in the assets of said First National Bank of Meridian now held by J. G. Repsher, Marshall Loeb and W. W. Willis as Trustees be condemned to the payment of said judgment, and that said Trustees be required to account to this Court therefor.

Or if mistaken in the relief prayed for, then for such other, further and different relief as to the Court may seem meet and proper in the premises.

And as in duty bound complainant will ever pray, etc.

M. W. Amis, J. C. Floyd, Special Attorneys for James B. Gully, State Tax Collector.

[fol. 93] *Duly sworn to by J. D. Ready. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

OBJECTIONS TO ALLOWANCE OF PROPOSED AMENDMENT TO BILL —Filed March 19, 1934

And now comes First National Bank in Meridian and files this its objection to the allowance of a proposed amendment to the original bill which the plaintiff applied on February 19, 1934, for leave to file, and for grounds states the following:

1. The proposed amendment, which in form is a request for leave to amend after answer filed by defendant to the original bill, is, in reality, in its true nature and substance,

an application for leave to file a supplemental bill, and govern by Equity Rule No. 34.

Such proposed supplemental bill does not set up any new matters that have occurred since the filing of the original bill, nor any matters of which it is claimed or shown that [fol. 94] plaintiff was ignorant at the time of the filing of the original bill.

2. It affirmatively appears that First National Bank of Meridian, now sought to be made a party defendant to such suit, closed its doors January 13, 1931, by reason of insolvency, more than three years prior to the filing of application for leave to make it a party to this suit; that it has been out of business for more than three years prior to February 19, 1934, and is now no longer an existing national banking organization; that a Receiver thereof was appointed, administered the estate, disposed of all the assets, and that such receivership was finally closed July 15, 1932, in consequence of which said bank does not longer exist and has no assets upon which any judgment against it could operate, so that said First National Bank of Meridian is now no longer suable.

3. It affirmatively appears from the allegations of the original bill and the answer of the defendant thereto, that said First National Bank of Meridian is neither a necessary nor proper party to the suit between plaintiff and this defendant, and that to make it a party would constitute a misjoinder of parties defendant.

4. It affirmatively appears on the face of the original bill that the alleged assessments against First National Bank of Meridian were then and there null and void, and in violation of the laws of the State of Mississippi and of the United States.

5. It affirmatively appears from the original bill of complaint that there is and was no cause of action in favor of plaintiff against First National Bank of Meridian.

[fol. 95] As to Louis G. Selig:

6. It affirmatively appears from the original bill and answer thereto, that the Receivership of First National Bank of Meridian was finally closed July 15, 1932; and it is not true that Louis G. Selig is the duly appointed, quali-

fied and acting receiver of First National Bank of Meridian; that said Selig is not even in the employ of the Comptroller of the Currency as any sort of receiver; that he is a resident of New Orleans, Louisiana, and is not residing in or suable in the Southern District of Mississippi.

7. The said Louis G. Selig is neither a necessary nor proper party to this suit, and to make him a party would constitute a misjoinder of parties defendant.

As to W. W. Willis, J. G. Repsher and A. M. Loeb:

8. The said W. W. Willis, J. G. Repsher and A. M. Loeb, Trustees, are neither necessary nor proper parties to this suit, and their joinder would constitute a misjoinder of parties defendant.

9. It affirmatively appears from the original bill that there is no judgment that could be rendered against the said trustees in this case in favor of plaintiff, and that plaintiff has no cause of action against said Trustees, since it is manifest on the face of plaintiff's own pleadings and exhibits that said W. W. Willis, J. G. Repsher and A. M. Loeb, are not trustees for plaintiff or defendant, have no assets on which plaintiff has any lien whatever, owe plaintiff nothing, not even the duty to account to him, and plaintiff neither has nor could obtain any judgment condemning any assets in their hands to pay any amount to him, since (a) the plaintiff has no right against the claim of the creditors for whom such parties are trustees, since (b) no such right [fol. 96] is claimed in the suit nor the proposed amendment (c) there has never been any assessment at all of the tax claimed against any of the shareholders, and indeed no valid assessment of any tax at all; and (d) since none of the parties for whom alone the said parties are trustees are before the Court.

10. The allowance of such supplemental pleading would be to permit an entire departure in pleading, would in effect be an entirely new suit, would not aid nor further the determination of the only issues raised or that could be raised between plaintiff and this defendant, and would not be in furtherance of justice.

Respectfully submitted, Bozeman & Cameron, Wilbourn, Miller & Wilbourn for Defendant First National Bank in Meridian.

STATE OF MISSISSIPPI,
County of Lauderdale:

Personally appeared before me the undersigned authority in and for the above county and state, Stella Elson who on oath states that during the period of the receivership of First National Bank of Meridian she was an assistant or clerk to the original receiver, C. P. Rogers, and to his successor, Louis G. Selig, and that by virtue of her connection with the matter as such assistance or clerk to such receivers, she personally knows that the receivership of the First National Bank of Meridian was finally closed as of July 15, 1932.

Affiant further states that she personally knows that no receivership of said bank is now pending; that no one is acting as the receiver of said bank and that Louis G. Selig is not now an acting receiver of said bank; that he is not in the employ of the Comptroller of the Currency or of the [fol. 97] Treasury Department, but on the contrary now resides in New Orleans, Louisiana, and is in the employ of The Federal Land Bank of New Orleans.

Stella A. Elson.

Sworn to and subscribed before me by Stella Elson on this the 24th day of February, A. D. 1934. Henry J. Meyer, Notary Public. My Commission Expires Sept. 11, 1937. (Seal.)

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION FOR LEAVE TO AMEND BILL OF COMPLAINT

This cause coming on for hearing on motion of the plaintiff for leave to amend the original bill filed in this cause by making parties to this cause The First National Bank of Meridian, Louis G. Selig as Receiver of First National Bank of Meridian, and J. G. Repsher, W. W. Willis and A. M. Loeb, Trustees;

And the Court having heard and considered said motion and the argument of counsel thereon, doth hereby order and decree that said motion be and it is hereby denied.

To the ruling of the Court, counsel for plaintiff then and there in open Court duly excepted and such exception is herewith allowed by the Court.

Done in open Court on this the 20th day of March, A. D. 1934.

Allen Cox, Judge.

[fol. 98] IN UNITED STATES DISTRICT COURT

MOTION FOR SETTING OF CAUSE, ETC.—Filed March 20, 1934

And now comes the complainant herein, J. B. Gully, State Tax Collector, by his attorneys, and files herewith his motion for a setting of the above captioned case in preference to other civil causes pending in this Court between private parties in accordance with Section 768, Title 28, U. S. C. A. (Revised Statutes, 949), and attaches hereto in support of said motion an affidavit which sets forth the causes or reasons assigned for such preference setting.

Respectfully submitted, Marshall W. Amis, J. C. Floyd, Attorneys for State Tax Collector.

AFFIDAVIT OF J. D. READY

STATE OF MISSISSIPPI,
Lauderdale County:

Personally appeared before me the undersigned authority, in and for the above named County and State, J. D. Ready, Deputy State Tax Collector, who, after by me first being duly sworn, on oath, says that:

1. The cause of J. B. Gully, State Tax Collector v. First National Bank in Meridian, Mississippi, now pending in this Court is a suit for certain ad valorem taxes due the City of Meridian, Meridian Separate School District, Lauderdale County, and State of Mississippi for the year 1930, which [fol. 99] said taxes have been due since December 1, 1930, and delinquent since February 1, 1931.

2. The City of Meridian, subsequently to the delinquent date of said taxes, sold certain tax redemption certificates which will mature on or about April 1, 1934, and said City

of Meridian needs the money due it, as set forth in this suit, to take care of these and other obligations.

3. The County of Lauderdale has certain indebtednesses maturing in the near future, including bonds, warrants, and other certificates of indebtedness, and it needs the amount of money due it, as set forth in this suit, for the purpose of meeting said obligations.

4. On a trial of this cause, it will be necessary to use certain witnesses who were connected with the First National Bank of Meridian and certain records of said bank and said bank is no longer actively engaged in business, and as time passes it will be more difficult to obtain the attendance of said witnesses and obtain said records.

5. If this said cause were required to take its regular place on the docket of this Court and await its turn for a hearing, it probably could not be heard for several years, and it, therefore, would work a great detriment to the State of Mississippi and the other parties to said cause.

6. Affiant would show that the same method of assessment for taxation was used by the tax assessors in the assessments which are involved in this suit as is now used in practically all the counties and municipalities of the state insofar as the assessment for taxes of national banks is concerned, and the defendant, the First National Bank in [fol. 100] Meridian, in this cause has challenged the constitutionality and validity under the constitution and laws of the United States of said taxes and of said method of assessment, and further there is now pending other suits in the State of Mississippi where the same question as to validity and constitutionality of assessment for taxes against national banks is raised, and by reason thereof, it is of vital importance to the State of Mississippi and its political subdivisions that said question concerning its method of assessment and taxation of national banks in the execution of its revenue laws be immediately determined.

7. The power of the State of Mississippi to tax the property involved in the assessment for taxes herein sued on and property of similar kind and character owned by national banks is challenged in the answer of the defendant herein, and by reason thereof a decision of this suit will materially affect the enforcement and execution of the reve-

nue laws of the State of Mississippi and the political subdivisions thereof, and by reason thereof, it is of vital importance that this cause be disposed of at the earliest possible date.

J. D. Ready, Deputy State Tax Collector.

Sworn to and subscribed before me, this the 20 day of March, 1934. J. C. Covert, Jr., Notary Public. (Seal.)

IN UNITED STATES DISTRICT COURT

MOTION FOR LEAVE TO AMEND ORIGINAL BILL—Filed November 1, 1934

And now comes James B. Gully, State Tax Collector, by his attorneys, and respectfully moves the Court for author-
[fol. 101] ity to amend the original bill in this cause in the following particulars:

By substituting the following amended paragraph 7 of said bill for paragraph 7 included in the original bill, to wit:

"7th. That during the year 1930 the shareholders of the First National Bank of Meridian were subject to taxation by the State of Mississippi, by the County of Lauderdale, by the City of Meridian, and by the Meridian Separate School District upon the capital stock, surplus, and undivided profits of said bank in the manner provided by the laws of the State of Mississippi and the charter and ordinances of the City of Meridian and the laws of the United States, and the said bank was by law required to make a proper return for assessment of and to pay said taxes as agent of its said shareholders as provided by law."

By substituting the following amended paragraph 8 of said original bill for paragraph 8 of said original bill as filed, to wit:

"8th. That during the year 1930, pursuant to its said duty, said bank undertook to make return for assessment of said tax, as required by the laws of the State of Mississippi and of the United States, and the said First Na-

tional Bank of Meridian, acting through its proper officers, did make a return to the Tax Assessor or Lauderdale County, Mississippi, for the purpose of an assessment of the capital stock, surplus, and undivided profits of said bank. That said return so made by said bank was used by the said Tax Assessor of Lauderdale County, Mississippi, in making said assessment of said capital stock, surplus, and undivided profits in exact accordance with said return as made by said bank; and said assessment for state and county taxes for the year 1930 so returned by [fol. 102] said bank was by said Assessor copied upon page 12 of the Personal Assessment Roll of Lauderdale County for the year 1930, in words and figures as follows, to wit:

Name—Bank, First

Banks capital stock, surplus and undivided profits less book value of real estate.....	$540,135.00
Total valuation of all personal property...	540,135.00"

By substituting for the twenty-first paragraph of said original bill as filed, the following amended paragraph twenty-one:

"21st. That during the year 1930, pursuant to its said duty, said First National Bank of Meridian, undertook to make return for assessment for taxes due the City of Meridian, as required by the charter, charter amendments, and ordinances of the City of Meridian, the laws of the State of Mississippi and of the United States, and the said First National Bank of Meridian, acting through its proper officers, did make a return to the Tax Assessor of the City of Meridian, Mississippi, for the purpose of an assessment of the capital stock, surplus, and undivided profits of said bank. That said return so made by said bank was used by the said Tax Assessor of the City of Meridian in making said assessment of said capital stock, surplus, and undivided profits in exact accordance with said return as made by said bank, and said assessment for City of Meridian and Meridian Separate School District taxes for the year 1930 so returned by said bank was by said City Tax Assessor copied upon page — upon the

Personal Assessment Roll of the City of Meridian for the year 1930, in words and figures as follows, to wit:

'First National Bank

2600 shares capital stock	$260,000.00
Surplus and Undivided Profits	313,890.00
	$573,890.00
[fol. 103] Less Real Estate	33,700.00
	$540,190.00
Total value of all Personal Property	$540,190.00
Total Tax on Same	$13,504.75'''

By adding to said original bill as an amendment or supplement thereto the following as paragraph forty-three:

"43rd. That for many years prior to the year *year* 1930, the said First National Bank of Meridian had been required by the laws of the State of Mississippi and of the United States to make returns for assessment of its capital stock, surplus, and undivided profits and to make payment of the taxes due thereon as agent of its shareholders; that pursuant to such duty it had for many years prior to the year 1930 made to the Tax Assessor of Lauderdale County and to the Tax Assessor of the City of Meridian its returns for assessment of its capital stock, surplus, and undivided profits in the same manner and form as it did for the year 1930, and that pursuant to such returns theretofore made by it the Assessor of Lauderdale County, Mississippi, and the Assessor of the City of Meridian made the assessments against the capital stock, surplus, and undivided profits of said bank in the same manner and form and to the same effect as was done for the year 1930, and that during all said years the said bank as agent of its shareholders had paid said taxes for and on behalf of its shareholders. And the complainant now charges that since by law the said bank as agent of its shareholders was required to make proper returns of its capital stock, surplus, and undivided profits to the Assessor of Lauderdale

County, Mississippi, and to the Assessor of the City of Meridian, for assessment, and since during many years preceding the year 1930 it had made returns in the same form and substance as the returns made by it for the year [fol. 104] 1930 and had pursuant thereto, as agent for its several shareholders, paid the taxes so assessed, it is now estopped to say that the said assessments are not legal, valid, and binding against it and its said several shareholders. And complainant further says and charges that since the First National Bank of Meridian was at the time of its failure estopped to deny the legal validity of said assessments by reason of the matters and things hereinbefore stated, and since the defendant, the First National Bank in Meridian, has heretofore by its valid and legal contract with the Receiver of the said First National Bank of Meridian, Exhibit "F" hereto, assumed and agreed to pay all the liabilities of the said First National Bank of Meridian, and since the First National Bank in Meridian has by its valid and legal contracts with the shareholders of the First National Bank of Meridian, Exhibits "H" and "I" hereto, agreed to relieve said shareholders of all statutory liability imposed upon them as shareholders in the First National Bank of Meridian, that the said First National Bank in Meridian is now estopped to question the validity of the said assessments in the same way and to the same extent as the First National Bank of Meridian, or its shareholders, was at the time of its failure on the 13th day of January, 1931."

Complainant would show that said amendments are necessary in his opinion in order that complete justice may be done between the parties, and in order that said bill may accurately present to the Court the facts upon which the complainant believes he is entitled to the relief sought in said original bill.

That said amendments have been made necessary because of certain errors, omissions or inaccuracies which were inadvertently made in the original bill and which have been brought to the attention of counsel for the complainant since the original bill was filed.

[fol. 105] Complainant would further show that said motion for amendment is not made for the purpose of delay, but the complainant and his counsel are of the opinion that

said amendments should be allowed in the furtherance of justice.

Respectfully submitted, J. C. Floyd, Counsel for Complainant.

Duly sworn to by J. D. Ready. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

OBJECTIONS OF DEFENDANT, FIRST NATIONAL BANK IN MERIDIAN, TO THE ALLOWANCE BY THE COURT OF THE AMENDMENTS TO THE BILL OF COMPLAINT SET OUT IN PLAINTIFF'S MOTION TO AMEND THE ORIGINAL BILL OF COMPLAINT—Filed March 18, 1935

And now comes First National Bank in Meridian and files this its objection to the allowance of the various [fol. 106] amendments set forth in a motion of the plaintiff filed on the — day of October, 1934, copy of which was served on attorneys for defendant on the 30th day of October, 1934, and for grounds of such objection state the following:

The bill of complaint in this case was originally filed on the 1st day of August, 1933, in the Chancery Court of Lauderdale County, Mississippi, and was thereupon removed to the District Court of the United States for the Eastern Division of the Southern District of Mississippi.

The motion to remand the case to the State Court was made in the District Court of the United States for the Eastern Division of the Southern District of Mississippi and was overruled by such Court on the 23rd day of October, 1933.

Thereafter, on the 27th day of October, 1933, the defendant, First National Bank in Meridian filed its answer and its motion to dismiss the bill of complaint, which motion to dismiss is incorporated in the said answer.

The motion to dismiss the bill of complaint was heard and argued at the regular September Term 1934 of the District Court of the United States for the Eastern Division of the Southern District of Mississippi, and the Court announced orally the Court's conclusion that the motion to dismiss should be sustained.

Thereupon in open Court, counsel for plaintiff requested the Court to take the cause under advisement for thirty days before entering any decree on the motion to dismiss, in order to enable plaintiff's counsel to determine whether or not they desired to ask any leave to amend the bill of complaint or whether or not they would decline [fol. 107] to amend and suffer a decree final to be entered and prosecute an appeal.

At the instance of counsel for plaintiff, the Court entered an order taking the case under advisement which said decree is worded as follows:

"It is hereby ordered that the above captioned case be and it is hereby taken under advisement for a decree to be rendered within thirty days on the motion to dismiss filed by the defendant.

"So Ordered, Adjudged And Decreed, this the 28th day of September, 1934."

Subsequently, a decree extending the time for entry of decree on the motion to dismiss was entered reading as follows:

"It is hereby ordered by the Court, on the agreement of the parties that in this cause, which was taken under advisement at regular September Term 1934, decree may be rendered on or before November 3rd, A. D. 1934."

Thereupon and on the 30th day of October, 1934, plaintiff served copy of motion to amend the bill of complaint on counsel for the defendant, to the granting of which the defendant interposes the following specific objections:

1. The proposed amendments come too late and no valid excuse is offered in the motion for the failure to make the averments now sought to be made, in the original bill.

2. It is not shown that the matters and things now sought to be averred were unknown to or might not have been known to the plaintiff at the time of the filing of the bill [fol. 108] of complaint. And, it is not sufficiently made known to the Court that the plaintiff was ignorant of them when the bill of complaint was filed.

3. It does not appear that any of the averments now sought to be introduced into the bill relate to facts occurring after the filing of the original bill, nor to facts of which the plaintiff was ignorant when the original bill was filed.

4. The purport of the proposed amendments is an effort to show that the Old First National Bank of Meridian was estopped to say that the assessments were not legal, valid and binding against it and its several shareholders and that this defendant is, also, estopped by virtue of the contracts, Exhibit- F, H and I to the original bill of complaint. But defendant shows that the averments of the proposed amendments upon which such contention of the plaintiff is predicated are insufficient in law to establish any estoppel whatever.

5. The proposed amendments are statements of the conclusions of the pleader not borne out by any facts averred therein, nor in the original bill of complaint, and not sustained but contradicted by the exhibits presented with the original bill of complaint.

6. The amendments fail to show that the First National Bank of Meridian in any way prevented either the assessor of the City of Meridian or the assessor of the County of Lauderdale, Mississippi, from making legal and valid assessments upon the returns and information furnished by said bank and failed to show any facts which now estop this defendant to say and contend that the assessments in question are illegal and invalid.

[fol. 109] 7. It would be futile to grant the plaintiff's motion and to allow the proposed amendments to the bill of complaint, because of the fact that if the said amendments to the bill be made, still the bill as amended would state no cause of action against this defendant, and would still be subject to the same objections as were made to the original bill in this defendant's motion to dismiss the same.

And by way of further response to the motion of plaintiff for leave to amend this defendant says that it denies that it is necessary, in order that complete justice may be done between the parties, that said amendment should be allowed because the defendant says that the amendments, if allowed would not change the legal effect

of the bill, and the bill as amended would not state any cause of action against this defendant.

Wherefore, defendant prays the Court to disallow the proposed amendment.

Respectfully submitted, Bozeman & Cameron, Wilbourn, Miller & Wilbourn, Attorneys for Defendant.

Duly sworn to by W. B. Chipman. Jurat omitted in printing.

[fol. 110] IN UNITED STATES DISTRICT COURT

MOTION OF COMPLAINANT FOR SEPARATE CONCLUSIONS OF LAW AND/OR OPINION—Filed Nov. 1, 1934

And now comes the complainant herein, by his counsel, and moves the Court to set forth separately from the decree rendered herein its conclusions of law and/or written opinion, as provided by Equity Rule 70½.

Respectfully submitted, J. C. Floyd, Counsel for Complainant.

AGREEMENT

It is agreed by counsel for complainant and defendant, and the record may so show, that when the District Court announced orally that the motion to dismiss would be sustained, counsel for complainant called to the Court's attention the motion theretofore filed for separate conclusions of law and thereupon the District Judge directed counsel for defendant in preparing the final decree to include such conclusions of law therein.

[fol. 111] "That thereafter counsel for defendant prepared the final decree, submitted it to counsel for complainant, and to the District Judge and the District Judge signed the same in the presence of counsel for complainant and defendant and counsel for complainant made no objection to the form of the decree and no further motion for additional conclusions of law."

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 122

JAMES B. GULLY, State Tax Collector, Plaintiff,

vs.

FIRST NATIONAL BANK OF MERIDIAN, Defendant

FINAL DECREE—March 27, 1935

This cause came on to be heard at the September Term, A. D. 1934, of this Court, on the original bill and the motion of the defendant to dismiss same, and the Court heard and considered same and the argument of counsel, and, being fully advised in the premises, found and herein states the following conclusions of law, to-wit:

That the assessment of the capital stock, surplus and undivided profits of First National Bank of Meridian, less book value of real estate, at the sum of $540,135.00, for the State and County Taxes for the year 1930, to the bank itself, as set forth in the 8th paragraph of the original bill, and the assessment of

[fol. 112]

2600 shares Capital stock	$260,000.00
Surplus and Undivided Profits	313,890.00
	$573,890.00
Less Real Estate	33,700.00
Total value of all Personal Property	$540,190.00

for taxes due the City of Meridian and the Meridian Separate School District, for the year 1930, direct to First National Bank of Meridian, as set forth in the 21st paragraph of the bill of complaint, were not and are not equivalent to a tax against the shareholders in respect of their shares, and that such assessments against said bank were and are beyond the power of the taxing authorities of the said State, County and Municipality, and Separate School District, contrary to the applicable provisions of the ap-

plicable laws of the United States and of the State of Mississippi, and wholly void and unenforceable; that the original bill does not allege the existence of any facst that did or would estop said bank and the receiver thereof to claim the invalidity of such assessments; that the taxes levied pursuant to such assessments, not having been paid at the time the First National Bank of Meridian became insolvent and a receiver thereof was appointed, were not a lien upon the assets of the bank in the hands of such receiver; that the bill does not aver any state of facts showing that the defendant, First National Bank in Meridian, which purchased such assets of such receiver of First National Bank of Meridian, was either estopped to claim the invalidity of such assessments or was liable to plaintiff for such taxes; that the bill of complaint stated no cause of action against the defendant, First National Bank in Meridian, and ought to be dismissed.

Thereupon the plaintiff asked the Court to defer entry of decree dismisisng the bill of complaint and to take said [fol. 113] cause under advisement for thirty days, to allow plaintiff time to determine whether or not plaintiff would decline to plead further or seek to amend the bill, and the Court, at the September Term 1934, simply entered a decree taking the cause under advisement for entry of decree in vacation.

Thereupon plaintiff filed a motion for leave to amend the bill of complaint, to which defendant filed written objections, and the matter not having been heard in vacation, the cause came on again to be heard at this, the March Term 1935, of this Court on plaintiff's motion to amend the bill and defendant's objections thereto, and the Court again heard and considered the argument of Counsel thereon, and now finds and states, as conclusions of law, that the proposed amendments, if allowed, neither change in any material way the legal effect of the original bill, nor cure the defects therein; that considering the bill as amended by the proposed amendments, the Court is of the opinion, that the assessments relied on are not the equivalent of a tax on the shareholders, are wholly void, contrary to the laws of the United States and of the State of Mississippi, beyond the power of such taxing authorities and unenforceable; that the taxes sued for, based on such assessments, were not a lien on the assets of the First Na-

tional Bank of Meridian in the hands of the receiver thereof; that neither said bank nor its receiver were estopped to assert the invalidity of such assessments and tax levies; that the proposed amendments do not show that the defendant bank is estopped in any way to assert the invalidity of the assessment and levy of the taxes sued for; that the bill, if amended as prayed, would state no cause of action against defendant; and that the doing of complete justice does not require the allowance of such amendments.
[fol. 114] It is, therefore, ordered, adjudged and decreed by the Court as follows:

1. That the said motion for leave to amend the bill of complaint filed herein on November 2, 1934, be and the same is hereby over-ruled.

2. And, plaintiff asking no further leave to amend, but declining to plead further, that defendant's motion to dismiss be and the same is hereby sustained, and the bill of complaint be and it is hereby dismissed.

To the aforesaid ruling and decree of the Court, the plaintiff in open Court then and there excepted, and said exception is hereby allowed, and it is ordered that the proposed amendment and defendant's written objections thereto be made a part of the record, on any appeal from this decree.

Ordered, adjudged and decreed this the 27th day of March, A. D. 1935.

Allen Cox, Judge.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed April 6, 1935

To the Hon. Allen Cox, United States District Judge:

The complainant, James B. Gully, State Tax Collector, suing for the use and benefit of the City of Meridian, County of Lauderdale, and State of Mississippi, feeling himself aggrieved by the decree made and entered in this cause on the 27th day of March, 1935, hereby prays an appeal from said decree to the Circuit Court of Appeals of [fol. 115] the Fifth Circuit, for the reasons specified in the

assignment of errors which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law and that a transcript of the record, proceedings, and papers upon which said decree was based, duly authenticated, may be sent to the United States Fifth Circuit Court of Appeals, sitting at New Orleans, Louisiana.

And your petitioner further prays that proper order touching the security required of him to perfect his appeal be made.

J. C. Floyd, Of Counsel for Complainant.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed April 6, 1935

And now comes the complainant in the above captioned cause and says that the decree of the United States District Court for the Eastern Division of the Southern District of Mississippi, entered on March 27, 1935, in the above captioned cause is erroneous and contains errors greatly to the prejudice of the complainant, plaintiff in error and he assigns as such error the following, to wit:

1. The District Court erred in overruling by its decree of October 21, 1933 the motion of complainant filed on October 16, 1933 to remand this cause to the State Court, in that said cause was improperly removed to the United States District Court and said Court was without jurisdiction to hear and determine said cause.

2. The District Court erred in overruling by its decree of March 20, 1934 the complainant's motion filed on March [fol. 116] 20, 1934 to amend its original bill in the particulars set forth in said motion.

3. The District Court erred in overruling by its decree of March 27, 1935 the motion of complainant filed on November 1, 1934 to be allowed to amend its original bill in the particulars set out in said motion.

4. The District Court erred in sustaining by decree of March 27, 1935 the motion of the defendant filed October 27, 1933 to dismiss the original bill.

5. The District Court erred in not setting forth fully, as required by Equity Rule 70½, and as prayed for in complainant's motion filed November 1, 1934, separately from the final decree rendered herein its conclusions of law and/or written opinion on each of the points raised by the defendant in its motion to dismiss, which motion was sustained.

6. The District Court erred in dismissing the original bill of complaint.

7. And for other errors apparent.

J. C. Floyd, Of Counsel for Complainant, Plaintiff in Error.

We, the undersigned solicitors for the defendant in the above captioned cause, hereby acknowledge receipt of a copy and service of the above and foregoing assignment of error.

This the 6th day of April, 1935.

Bozeman & Cameron, Wilbourn, Miller & Wilbourn, by R. E. Wilbourn, Attorneys for Defendant.

[fol. 117] In United States District Court

Order Allowing Appeal and Fixing Bond—Filed April 6, 1935

This cause coming on this day to be heard on the petition for an appeal filed by the complainant herein, and the Court after having heard and considered said petition, does hereby order and adjudge that said petition for an appeal be and it is hereby granted, and that said appeal be allowed upon the defendant giving a bond conditioned as required by law in the sum of Five Hundred Dollars ($500.00), said bond to be approved by this Court.

So ordered, adjudged, and decreed, this the 8th day of April, 1935.

Allen Cox, District Judge.

Bond on appeal for $500.00, approved and filed April 6, 1935, omitted in printing.

[fol. 118] IN UNITED STATES DISTRICT COURT

AGREEMENT AS TO RECORD

It Is Agreed by and between counsel for the complainant, plaintiff in error, and counsel for defendant, defendant [fol. 119] in error, for the purpose of condensing and shortening the record on appeal, that the following may be inserted in the form indicated:

1. Caption and organization of Court.
2. Agreed record.

(a) Insert original bill of complaint prefaced with the following statement:

"This cause was originally instituted in the Chancery Court of Lauderdale County, Mississippi by bill of complaint filed on August 1, 1933 in words and figures as follows, to wit:"

(b) Insert exhibits to original bill.

(c) Omit summons and use the following statement:

"Summons was duly issued and served, returnable to the rules day of said Court to be held on the second Monday of August, 1933." Within the time allowed by the State Law to plead to such suit, defendant filed petition to remove.

(d) Insert removal proceedings.

(e) Insert after inclusion of removal proceedings, the following statement:

"The transcript from the Lauderdale County Chancery Court was filed in the District Court within the time required by law, to wit, on September 30, 1933."

[fol. 120] (f) Omit State Court cost bill and insert the following statement:

"The defendant filed in the District Court cost bill from the Chancery Court of Lauderdale County, Mississippi, showing cost paid by it in the sum of $27.65."

(g) Insert notice of motion to remand.

(h) Insert motion to remand.

(i) Insert order overruling motion to remand.
(j) Insert the following statement:

"The defendant on October 27, 1933, filed in the District Court its answer to the original bill and included in such answer a motion to dismiss. The answer is as follows:

(k) Insert answer, including motion to dismiss.
(l) Insert motion of complainant to amend original bill.
(m) Insert amendment to bill of complaint prefaced by the following statement:

"Attached to and filed with the motion to amend was the following proposed amendment":

(n) Insert objections to amendment.
(o) Insert order overruling motion to amend.
(p) Insert motion for setting of cause and affidavit attached thereto.
[fol. 121] (q) Insert motion of complaint to amend original bill and proposed amendments.

(r) Insert objections to amendment to original bill of complaint.

(s) Insert motion of complainant for separate conclusions of law followed by this statement:

"It is agreed by counsel for complainant and defendant, and the record may so show, that when the District Court announced orally that the motion to dismiss would be sustained, counsel for complainant called to the Court's attention the motion theretofore filed for separate conclusions of law and thereupon the District Judge directed counsel for defendant in preparing the final decree to include such conclusions of law therein.

"That thereafter counsel for defendant prepared the final decree, submitted it to counsel for complainant, and to the District Judge and the District Judge signed the same in the presence of counsel for complainant and defendant and counsel for complainant made no further objection to the form of the decree and no further motion for additional conclusions of law."

(t) Insert final decree disallowing amendments and dismissing original bill.

(u) Insert petition for appeal.

(v) Insert assignment of errors.

[fol. 122] (w) Insert order allowing appeal and fixing bond.

(x) Insert appeal bond.

(y) Insert waiver of citation and entry of appearance of defendant.

(z) Insert præcipe.

In order to shorten the præcipe, the above in the form indicated may be designated therein as "Agreed record".

It is further agreed that neither party is precluded by the foregoing from including other papers in their præcipe, this agreement being merely to shorten the record as above indicated.

This the 10 day of April, 1935.

Marshall W. Amis, J. C. Floyd, Attorneys for Complainant, Plaintiff in Error. Bozeman & Cameron, Wilbourn, Miller & Wilbourn, A. S. Bozeman, R. E. Wilbourn, Attorneys for Defendant, Defendant in Error.

[fol. 123] IN UNITED STATES DISTRICT COURT

PRÆCIPE—Filed April 11, 1935

To the Hon. B. L. Todd, Jr., United States District Clerk:

In making up the record on appeal in the foregoing case, please insert the following:

1. Agreed record as per agreement of counsel.

Marshall W. Amis & J. C. Floyd, Counsel for Complainant, Plaintiff in Error.

We acknowledge receipt of a copy of the foregoing præcipe and waive formal service of same.

This the 10 day of April, 1935.

Bozeman & Cameron, Wilbourn, Miller & Wilbourn, Counsel for Defendant, Defendant in Error.

In United States District Court

Waiver of Citation and Service Thereon and Entry of Appearance—Filed April 11, 1935

The complainant, plaintiff in error, J. B. Gully, State Tax Collector, having filed in the District Court of the United States for the Eastern Division of the Southern District of [fol. 124] Mississippi his petition for an appeal from the decree rendered herein against him on the 27th day of March, 1935, together with an assignment of errors, order of the Judge of said District Court allowing said appeal, and his appeal bond in the penalty of Five Hundred Dollars ($500.00).

The said defendant, First National Bank in Meridian, does hereby waive the issuance and service of citation on said appeal and enters its appearance in the Circuit Court of Appeals of the Fifth Circuit in New Orleans, Louisiana, to which the said appeal is prosecuted, as of thirty days from this date to show cause, if any there be, why the decree appealed from should not be corrected and speedy justice done the parties in that behalf.

This the 10th day of April, 1935.

First National Bank in Meridian, by Bozeman & Cameron, Wilbourn, Miller & Wilbourn, Its Attorneys.

[fol. 125] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 126] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of January 7th, 1936

No. 7767

JAMES B. GULLY, State Tax Collector,

versus

FIRST NATIONAL BANK IN MERIDIAN

On this day this cause was called, and, after argument by J. C. Floyd, Esq., and Marshall W. Amis, Esq., for appellant, and R. E. Wilbourn, Esq., for appellee, was submitted to the Court.

[fol. 127] OPINION OF THE COURT—Filed January 18, 1936

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 7767

JAMES B. GULLY, State Tax Collector, Appellant,

versus

FIRST NATIONAL BANK IN MERIDIAN, Appellee

Appeal from the District Court of the United States for the Southern District of Mississippi

(January 18, 1936)

Before Foster, Sibley and Walker, Circuit Judges

SIBLEY, Circuit Judge:

During 1930 the First National Bank of Meridian did business in Meridian, Miss. It suspended Jan. 13, 1931, and was put into a receiver's hands. He transferred most of

the assets to the newly organized First National Bank in Meridian on June 4, 1931. The State Tax Collector on Aug. 1st, 1933, sued the latter bank, which we will distinguish as the new bank, for State, county and municipal taxes for 1930, assessed on returns made by the old bank, he asserting that the new bank had agreed to pay them in its pur- [fol. 128] chase of the assets of the old bank. The suit, brought in a State court, was by the new bank removed to the federal court on two grounds: That the suit arose under the laws of the United States, and that it was one for winding up the affairs of a national bank. Remand was denied. The petition was dismissed as showing no cause of action after two amendments were refused. The State Tax Collector appeals, assigning as error the refusal to remand, the refusal of the amendments, and the dismissal of the suit.

Each assignment requires an understanding of the allegations of the original petition. In addition to the general facts above stated, it sets forth in great detail the laws of the State and the charter powers of the city and school district involved but makes no special mention of any law of the United States. The petition asserts that the old bank was a national banking association organized under the laws of the United States and was subject to taxation by the State, county, city and school district where it did business, that it made a return during 1930 in its own name for State and county taxes thus: "Bank's capital stock, surplus and undivided profits less book value of real estate $540,-135. Total valuation of all personal property $540,135", and that the proper tax officers included in the assessment roll in those words that valuation of the capital, surplus and undivided profits of said bank, and that State and county taxes at rates fixed for the year were assessed in named amounts "against said capital stock, surplus and undivided profits of the First National Bank of Meridian." Similarly it is alleged that the old bank made a report to the city tax assessor of Meridian "of the number and amount of all the shares of its capital stock paid in and of the sum of all undivided profits, surplus and accumulation of every sort excluding its real estate" upon which there was entered upon the city assessment roll this: "First National Bank, 2600 shares capital stock, $260,000; surplus [fol. 129] and undivided profits, $313,890; (total), $573,890;

less real estate, $33,700, $540,190. Total value of all personal property $540,190; total tax on same $13,504.75." This figure included city and school taxes. The allegation is made that all these taxes were due by the bank's shareholders, but the bank was by law made liable to pay them as the shareholders' agent, and might charge them to the shareholders, and had in hand until Jan. 13, 1931, available funds belonging to the shareholders to protect it in so doing, but had failed and neglected to make payment on December 1st, 1930, when payment was due, and it became thereby directly and primarily liable for the taxes. It is alleged that on January 13, 1931, the old bank "became insolvent, suspended business and was thereafter duly liquidated by a receiver appointed by the Comptroller of the Currency." The contract of sale of the assets by the receiver to the new bank is exhibited. In a preliminary "whereas" clause it recites that the new bank as part of the consideration "will assume and pay in full, with interest, the claims of all other creditors against said suspended bank, whether said claims be known or unknown, which may be duly established according to law, and in addition will assume and pay in full all expenses of the receivership of said suspended bank both accrued and to accrue." In the formal agreement which follows the language is that the new bank will, besides surrendering numerous claims held by it under a creditors' agreement supposed to be over 90% of all claims, "pay $297,888.78, representing the amount necessary to pay all receivership expenses accrued and to accrue, and to enable the receiver to pay in full with interest to the date of payment the claims of all known creditors who have not executed the aforesaid creditors' agreement • • • and the said purchaser will pay the receiver such further sums from time to time during the period of active receivership as the receiver may deem necessary to meet receivership expenses and to provide for the payment of such un- [fol. 130] listed or unknown claims as may be established during the period of active receivership." The final allegation is that the new bank thereby became liable for these taxes and the prayer is for a personal decree.

Is this a suit arising under the laws of the United States? Although the new bank is alleged to be liable because of its contract, yet the State Tax Collector must and does assert also a tax claim collectible from the old bank. This in turn

necessarily involves a construction and application of the laws of the United States, because the old bank was a national bank. It is thoroughly settled that a national bank is an instrumentality of the federal government, and that a State and its subdivisions are wholly without any power, solely by virtue of State law to levy any tax, direct or indirect, upon such banks, their property, their franchises or the shares of their stock. The only authority to levy any such tax comes from the laws of Congress now expressed in 12 U. S. C. A. § 548. McCulloch vs. Maryland, 4 Wheat. 316; Owensboro National Bank vs. Owensboro, 173 U. S. 664; First National Bank of Gulfport vs. Adams, 258 U. S. 362; Des Moines National Bank vs. Fairweather, 263 U. S. 103; First National Bank of Guthrie vs. Anderson, 269 U. S. 341; and see Domenech vs. National City Bank, 294 U. S. 199. We recognize the rule that for a suit to arise under the Constitution or laws of the United States it must so appear in the allegations of the petition, and that the rule thus stated touching the original jurisdiction of the District Court is to be applied also to a removal for this cause under the present removal statute, 28 U. S. C. A. § 71. State of Tennessee vs. Union & Planters Bank, 152 U. S. 454; Minnesota vs. Northern Securities Co., 194 U. S. 48. We recognize also the rule that it is not enough that some defense is to be asserted which arises under such Constitution or laws. Taylor vs. Anderson, 234 U. S. 74. But Sect. 548 is not a limitation placed by the federal laws upon an antecedent right of the State to tax national banks, so as to be con- [fol. 131] sidered only a weapon of defense against such taxation. Both in form and in substance it is a grant of authority to State legislatures to tax such banks, limiting them, however, to one of three forms of taxation: either of the shares, or of the dividends from them included in the shareholder's taxable income, or of the income of the bank. The last form only is a tax against the bank. As to the first two forms of taxation, the section says that where nonresidents of the State own the shares or income, taxation of them shall be where the bank is located, and "such associations shall make return of such income and pay the tax thereon as agent of such nonresident shareholders." This very plainly indicates, both as to resident and nonresident shareholders, that the tax is on the shareholder and not on the bank, which in any case may, and in case of nonresident

shareholders must, act as agent of the shareholders in making return and paying the tax. The law of Mississippi Code of 1930, § 3138, adopts the plan of taxing the shares both in State and national banks on a return to be made by the president or cashier; adding "Each said bank and banking association shall nevertheless be liable to pay any taxes as agent of each of its shareholders and may pay the same out of their individual profit account, or charge the same to their expense account or to the account of such shareholder in proportion to their ownership." Without stopping to construe these provisions further than to say that they plainly pursue the permission of Sect. 548 to tax the shares of the shareholders, we assert that as to a national bank the state statute depends for its force on this law of the United States. A pleader need in general not plead any law, but only the facts on which he relies. When a petitioner is claiming federal jurisdiction he usually and properly points out the federal law on which he relies. But he cannot, by omitting reference to the law of the United States by virtue of which alone the facts pleaded could avail [fol. 132] to support the relief which he seeks, escape the jurisdiction of the federal courts over his suit when invoked by a petition for removal. Irrespective of the merit of his claims, the present suit of the State Tax Collector, insofar as it involves the assertion of a valid State tax against the old bank or against the shares of its stock, necessarily depends upon an application of the laws of the United States and arises under them. See Spokane Falls Ry. Co. vs. Zeigler, 167 U. S. 65; Hall vs. C., R. I. & P. R. R. Co., 149 Fed. 664. In Texas & Pacific Ry. Co. vs. Cody, 166 U. S. 606, judicial notice that the defendant Railway Company was a corporation organized under the laws of the United States was taken in order to sustain removal. Postal Tel. & Cable Co. vs. Alabama, 155 U. S. 482, has only a superficial likeness to this case. There the State was suing for taxes imposed by the independent authority of the State and not by federal authorization. That the present suit involves also a question of the liability of the new bank under its contract does not defeat jurisdiction. Jurisdiction because of a federal question persists irrespective of the decision made of that question, and even though it may be unnecessary to decide it at all, the case turning finally

on questions of State law. Green, Auditor, vs. Louisville Interurban R. R. Co., 244 U. S. 499.

On the other hand this is not a "case for winding up of the affairs of a national bank" of which the District Court is given jurisdiction by 28 U. S. C. A. § 41 (16). The agreement with the receiver, presumably duly authorized, disposed finally of the assets transferred by it. If the contention of the State Tax Collector is sound that it gave him a direct right of action against the new bank, the assertion of that right is merely a suit against the new bank on its contract and not one to wind up the affairs of the old bank. Compare Moulton vs. National Farmers Bank, 27 Fed. (2d) 403. Therefore, though the second ground for removal is [fol. 133] not well taken, the first ground holds good. The case was properly removed, and remand was properly refused.

Turning to the merits, the petition fails to set forth a cause of action against the new bank. The assessments above set forth speak for themselves, and cannot be altered by alleging legal conclusions about them. They assessed no shareholder and no share of stock, but undertook to assess the bank on the value of its assets other than real estate. The assessment for State and county taxes does not so much as mention shares. That for city taxes refers to the number of shares, but at last the valuation and assessment is of "all personal property" of the bank. The lien for taxes established by Mississippi Code, §3120, upon property assessed would attach to the personal property of the bank and not the shares of the stockholders. A similar assessment of the personal property of a national bank in Mississippi, although approved by the State Supreme Court, was held illegal in First National Bank of Gulfport vs. Adams, 258 U. S. 363. But, it is argued, that decision was rendered on a direct and timely attack upon the assessment, and in the absence of a return by the bank, whereas here the attack is collateral and the assessment followed a voluntary return by the bank and has been acquiesced in until after the bank's failure, which should estop the bank to question it. Whether a solvent bank may thus bind itself we do not inquire. The question here, as we shall show, is whether the receiver of an insolvent bank is bound, and it must be answered in the negative. In permitting State taxation of national banks Congress has not granted the

right to tax the bank on its personal property. One purpose was probably to preserve it for the creditors in case of insolvency. After insolveney the personal property cannot be taxed in the receiver's hands. Rosenblatt vs. Johnston, 104 U. S. 462. To compel the receiver to pay taxes which can lawfully be imposed only upon the shareholders and their [fol. 134] shares would be to take money from the creditors to pay obligations due by the shareholders, and is inadmissible. Stapylton vs. Thaggard, 91 Fed. 93; City of Boston vs. Bell, 51 Fed. 306, affirmed 55 Fed. 26; Brown vs. French, 80 Fed. 166; Baker vs. King County, — Wash. —, 50 Pac. 481. This view of the matter would prevent the receiver from paying these taxes out of the bank's assets, even had proper assessment been made against the shares and their owners. And it answers the further contentions of the State Tax Collector that the Mississippi Code, §3138, requires the bank to pay the tax on the shares with a right to charge it to the shareholders, and that Sect. 3122 makes "every lawful tax assessed, levied or imposed by the State or a county or municipality * * * a debt due by the person or corporation owning the property * * * upon which the tax is imposed, whether properly assessed or not * * * and may be recovered by action." A tax on the personal property of the bank has not been and cannot be lawfully assessed or imposed; and while a tax lawfully imposed on the shares according to Sect. 3138 may be required to be paid by the bank as agent for the shareholders so long as the bank is a going concern and can have a real recourse on the shareholders, as is held in First National Bank vs. Chehalis County, 166 U. S. 440; Van Slyke vs. Wisconsin, 154 U. S. 581, and First National Bank vs. Kentucky, 9 Wall. 353; insolvency ends the statutory agency to pay and the personal assets of the bank cannot thereafter be taken from creditors to pay the shareholders' debt.

We have assumed that the new bank can be held only for obligations that could have b n enforced against the receiver of the old bank. This we think is the correct interpretation of the contract. The preliminary recital as heretofore quoted is quite broad, but the contracting clause is specific and should be held to measure more exactly the [fol. 135] obligation assumed. That obligation is to pay a fixed sum to cover the claims referred to in the recital, and in addition to pay to the receiver such sum as the re-

ceiver may deem necessary to meet additional receivership expenses and to pay such unknown claims as "may be *duly established during the period of active receivership.*" Assuming, as is asserted, that in Mississippi, a third person for whose benefit a promise is made may enforce it by a direct suit against the promisor, the promise can be enforced only according to its terms. The tax claim here asserted is not shown to be one that was or could have been duly established against the receiver during the active receivership and which he could have called upon the new bank to pay.

One amendment offered and rejected elaborated some of the ideas already discussed, making express reference to the laws of the United States as relied upon by the petitioner. It alleged also that for several years the old bank had returned its property and been assessed just as in 1930 and had paid the taxes, whereby an estoppel was claimed to deny liability for the year 1930. We find no ground for an estoppel, especially as against the receiver. Brown vs. French, 80 Fed. 166. The amendment also set up that the stockholders of the old bank had assigned their shares for the benefit of the new bank under an agreement with an organization committee that the assignors "be relieved and held harmless from any and all statutory liability as a shareholder of the First National Bank of Meridian, Mississippi." It is not pleaded how the new bank became bound by the contract of the committee, but if bound, we think the reference was not to back taxes which the shareholders might owe on their stock, but to their liability to be assessed on the stock to pay the bank's debts under 12 U. S. C. A. § 64. Moreover, there is no assumption, but only an agreement to hold harmless, which would not justify a direct suit by the holder of an obligation. This amendment set up no better cause of action.

[fol. 136] Another amendment sought to add as parties the old bank and certain individuals who under the creditors' agreement were made trustees for a large amount of frozen assets to manage and collect them, from the proceeds of which the shareholders might eventually get something; and judgment was prayed against the old bank and the interest of the shareholders in the fund thus put with the trustees. Irrespective of the merit of the claims asserted against the old bank and the trustees, the amendment was

not germane to the original suit against the new bank and there was no error in rejecting it.

The judgment of the District Court is in all respects affirmed.

[fol. 137] JUDGMENT

Extract from the Minutes of January 18th, 1936

No. 7767

JAMES B. GULLY, State Tax Collector,

vs.

FIRST NATIONAL BANK IN MERIDIAN

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, James B. Gully, State Tax Collector, and the surety on the appeal bond herein, United States Fidelity & Guaranty Company, be condemned, in solido, to pay the costs of this cause in this Court.

[fol. 138] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 126 to 137 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for

the Fifth Circuit, in a certain cause in said Court numbered 7767, wherein James B. Gully, State Tax Collector is appellant, and First National Bank in Meridian is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 125 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 15th day of February, A. D. 1936.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 139] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 18, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, limited to the question of the jurisdiction of the District Court.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter J. C. Floyd. File No. 40,465. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 29. James B. Gully, State Tax Collector for the State of Mississippi, petitioner, vs. First National Bank in Meridian. Petition for a writ of certiorari and exhibit thereto. Filed April 10, 1936. Term No. 29, O. T. 1936.

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. [redacted] 29

JAMES B. GULLY, STATE TAX COLLECTOR, FOR THE STATE OF MISSISSIPPI, Petitioner

v.

FIRST NATIONAL BANK IN MERIDIAN, Respondent

PETITION FOR WRIT OF CERTIORARI

BRIEF IN SUPPORT OF PETITION

J. C. FLOYD,
Attorney for Petitioner

Marshall W. Amis,
Jackson, Miss.

J V. Gipson
Attorney for Board of Supervisors.

C. H. Westbrook,
Attorney for City of Meridian.

of Counsel.

TELL FARMER PRINTERS, MERIDIAN

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

JAMES B. GULLY, STATE TAX COLLECTOR FOR THE STATE OF MISSISSIPPI

PETITIONER

vs.

FIRST NATIONAL BANK IN MERIDIAN

RESPONDENT

No.----------

* * * *

We, the undersigned attorneys for the Respondent in the above entitled cause, do hereby acknowledge service of petition for writ of certiorari and the brief in support thereof, this the 2nd day of April, 1936.

R. E. WILBOURN,

A. S. BOZEMAN,

Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

JAMES B. GULLY, STATE TAX COLLECTOR,
FOR THE STATE OF MISSISSIPPI

PETITIONER

-v-

FIRST NATIONAL BANK IN MERIDIAN

RESPONDENT

No......

PETITION FOR WRIT OF CERTIORARI

May It Please The Court:

James B. Gully, State Tax Collector for the State of Mississippi, suing for the use and benefit of the State of Mississippi, County of Lauderdale, City of Meridian, and Meridian Separate School District, and United States Fidelity & Guaranty Company, surety on his appeal bond, petitioner, as against First National Bank *in* Meridian, respondent, shows:

SUMMARY STATEMENT OF MATTER INVOLVED

A.

Certiorari should be granted, because:

(a) The Fifth Circuit Court of Appeals,

(1) has decided a federal question in a way probably in conflict with applicable decisions of this Court; and

(2) has rendered a decision in conflict with the decisions of other circuit courts of appeals on the same matter; and

---

"NOTE—All *Italics* ours unless otherwise noted."

(3) has decided an important question of local law in a way probably in conflict with applicable local decisions; and

(4) has, we submit with utmost deference, so far sanctioned the departure of the District Court from established legal principles and authority as to render it necessary and requisite for this court to exercise its supervisory powers

(b) And for other reasons apparent.

B.

STATEMENT OF THE CASE

The cause was decided in the District Court on the pleadings, upon a motion to remand and a motion to dismiss. The averred facts found in the bill of complaint, pertinent to this petition, briefly stated, are these:

For many years prior to January 13, 1931, the First National Bank *of* Meridian was a national banking association, domiciled and operating in Meridian, Lauderdale County, Mississippi. (Tr. page 3, Par. 6)

During the year of 1930, and within the time specified by law, which was on or before April 1, the proper officer of the bank undertook to make a return for the purpose of assessment for taxation to both the municipal assessor, whose duty it was to assess property for the City of Meridian, and the Meridian Separate School District, and to the County Assessor, whose duty it was to assess property for Lauderdale County and the State of Mississippi, showing the bank's capital stock of $260,000, surplus and undivided profit of $313,890 less real estate $33,700, or a total taxable property of $540,-

190.00. (Tr. page 3, par. 8, page 8, par. 21; page 101, 102, 103, and 104.)

The tax assessors copied in exact form the returns as made upon their respective assessment rolls. Neither the returns nor the assessments showed the names of the various individual stockholders, but showed the assessment to be against the bank. Since the law required the bank, as agent for its stockholders, to make the return and pay the tax, for a long period of years prior to 1930 the bank had made its returns in the exact forms of these returns, and the assessment had been made in the exact form of these assessments, and the bank had paid the taxes. (Tr. page 102.).

The statutory procedure required for the filing of the assessment rolls, the notice of the equalization meeting for correction of any assessments, and final approval of the rolls were complied with. (Tr. page 4, par. 10; page 5, par. 6; page 9, 10 and 11.)

The bank nor any person for it, did not file objections to the assessments as made, and no appeal as provided for by law was taken from the assessments.

During the year, before and after the taxes became due and payable on December 1, 1930, the bank had dividends and other monies belonging to each and every one of the shareholders in its hands more than sufficient to pay each shareholders pro rata part of the tax. (Tr. page 7, par. 19; pag 11, par. 31.)

The total amount of the taxes due by the assessments to all of the taxing districts, as of December 1, 1930, was $26,-467.99. (Tr. page 20, par. 26.)

The taxes were not paid and on January 13, 1931, the

First National Bank *of* Meridian closed its doors and passed into the hands of a Receiver under the directions of the Comptroller of the Currency. (Tr. page 12, par. 34.)

The new bank was organized under the name of First National Bank *in* Meridian, and a contract was made between the new bank and the Receiver, whereby under the construction of the terms of the contract as contended for by appellant, in consideration of a transfer of practically all the assets of the old bank, the new bank agreed to "assume and pay in full with interest the claims of all other creditors against said suspended bank, whether said claims be known or unknown, which may be duly established according to law." (Tr. page 13, par. 35, page 36.)

No schedule of claims was attached to the contract.

The new bank for some reason desiring to obtain the outstanding capital stock of the old bank entered into a contract with all of the shareholders of the old bank for a purchase of the stock, and as consideration for its transfer agreed to "relieve the shareholders of the First National Bank *of* Meridian from any and all statutory liability imposed upon them as shareholders in said suspended bank". (Tr. page 13, par. 39; page 50, 51.)

The First National Bank *in* Meridian having failed, refused and neglected to pay the taxes claimed to be due by it by reason of the foregoing assessments and contracts, this suit was filed on August 1, 1933 in the Chancery Court of Lauderdale County, Mississippi by James B. Gully, State Tax Collector, for the use and benefit of the various taxing districts.

The defendant filed in the state court a petition and bond for removal of the cause to the United States District Court,

setting forth as ground for such removal that it was a suit arising under the laws of the United States and a suit for the winding up of the affairs of a national bank. (Tr. page 52.)

After the transcript had been filed in the District Court, the complainant made a motion to remand the cause to the state court on the ground that the District Court was without jurisdiction. The motion to remand was overruled. (Tr. page 62, 63.)

The cause then came on for hearing on the motion to dismiss filed by the defendant.

The motion to dismiss was sustained, the original bill dismissed. The complainant, petitioner here, prosecuted an appeal to the Fifth Circuit Court of Appeals. The order of the District Court was affirmed.

C.

Reasons relied upon for allowance of writ.

We very respectfully submit, with deference, that

1. The Circuit Court of Appeals erroneously held, in effect, that since this was a suit involving the taxation of a national bank by virtue of Section 5219 R. S. (Section 548 U. S. C. A. Title 12), it was necessarily a suit arising under the laws of the United States and therefore removable.

   This holding was in conflict with prior decisions of this court, and in conflict with decisions of other circuit courts of appeals, as shown by the authorities collated in the brief, in support hereof, attached hereto.

2. The Circuit Court of Appeals erroneously held the bill of complaint did not state a cause of action because

(a) the assessments involved were invalid

(b) the respondent did not assume the tax either by its

(i) contract with the Receiver or

(ii) its contract with the stockholders.

This holding was in conflict with applicable local decisions of the courts of last resort in the State of Mississippi, and of this court, as shown by the authorities collated in the brief in support hereof, attached hereto.

Wherefore, petitioner, and the surety on his appeal bond, against whom judgment was rendered, hereby pray a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, commanding that court forthwith to certify to this court for review on a day certain therein named a full and complete transcript of the record and all proceedings in the cause numbered and entitled on its docket, 7767 James B. Gully, State Tax Collector, v. First National Bank *in* Meridian, and that said decree of said court may be reversed and your petitioner have such other and further relief as to this Honorable Court seems meet and just, for which he hereby prays.

J. C. FLOYD,

Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

JAMES B. GULLY, STATE TAX COLLECTOR,
FOR THE STATE OF MISSISSIPPI

PETITIONER

v

FIRST NATIONAL BANK IN MERIDIAN

RESPONDENT

No.----------

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF THE COURT BELOW

The District Court rendered no written opinion but included in its final decree certain conclusions of law (Tr. page 111).

The opinion of the Circuit Court of Appeals appears in the record. (Tr. page 127). Reported 81 Fed. (2nd) 502.

II.

JURISDICTION

(1) The date of the judgment sought to be reviewed is January 18, 1936.

(2) Jurisdiction is invoked under Section 240 of the judicial code as amended (Section 347 U. S. C. A., Title 28).

(3) Jurisdiction is sustained by *Forsythe vs. Hammond,* 166 U. S. 506; 41 L. Ed. 1095; *Hamilton Brown Shoe Co. vs. Wolf Bros. Co.,* 40 U. S. 251; 60 L. Ed. 629, *Gay vs. Ruff,* 292 U. S. 25; 78 L. Ed. 1099.

III.

STATEMENT OF THE CASE

A statement of the case has been heretofore made in the petition, supra, page 2, and when necessary will be supplemented under the specific points.

IV.

SPECIFICATIONS OF ERROR

(1) The Circuit Court of Appeals erred in affirming the decree of the District Court and denying the petitioner relief, because:

(a) The cause was improperly removed from the state court and should have been remanded; and

(b) The bill of complaint states a valid cause of action against the respondent; and

(c) For other reasons apparent.

V.

ARGUMENT

POINT 1

Probable Conflict With Applicable Decisions of This Court

It is the contention of the petitioner that this cause was not removable from the state court, where it was instituted, to the United States District Court.

The removal petition filed by the defendant in error in the state court sought removal of the cause to the United States District Court on two (2) grounds, i. e. (1) that the suit was one of a civil nature arising under the laws of the United States of America, and (2) that the suit was for the

winding up of the affairs of an insolvent national bank.

The Circuit Court of Appeals held in accord with petitioner's contention that the second ground assigned was not well taken (Tr. 132), but sustained the removal upon the other ground, i. e., that the suit was one arising under the laws of the United States.

The bill of complaint discloses that it is a suit brought by J. B. Gully, the State Tax Collector for the State of Mississippi, for taxes due the State of Mississippi, and its political subdivisions (Tr. page 2, par. 1);

That it is a suit brought against only one defendant, The First National Bank *in* Meridian, a national banking association domiciled in Meridian, Miss. (Tr. page 2, par 2.);

That it is a suit seeking to collect taxes alleged to be due the County of Lauderdale, imposed by order of its board of supervisors (Tr. page 5, par. 12), the State of Mississippi imposed by Act of the Legislature (Tr. page 6, par 13), the City of Meridian imposed by municipal ordinance (Tr. page 9, par. 24) and the Meridian Separate School District imposed by ordinance (Tr. page 10, par. 25).

The bill further discloses by allegation of the complainant, that although the liability and obligation for the taxes so imposed and sued for originally rested upon the shareholders of the First National Bank *of* Meridian, because of certain acts and omissions of the First National Bank *of* Meridian, and certain statutory or legal obligations imposed by the State of Mississippi resting upon it, that the obligations became that of the First National Bank *of* Meridian (Tr. page 6, par 16 and 17; Tr. page 7, par. 18, 19 and 20; Tr. page 11, par. 28, 29, 30 and 31; Tr. page 12, par. 32; Tr. page 101, 102, 103 and 104);

That the obligation and liability of the defendant First National Bank *in* Meridian to pay the taxes is created by its contract with the Receiver, Exhibit "F" (Tr. page 36) and its contract with the stockholders, Exhibit "H" (Tr. page 50).

Thus, the action is based upon and arises under the provisions of Section 6991 of the Mississippi Code of 1930, making it the duty of the State Tax Collector to collect taxes where property has escaped taxation; the provisions of Section 3138 of the Mississippi Code of 1930 providing for the assessment of taxes against banks, especially banking associations, existing under the laws of the United States; the various orders of the local boards and the state statute making the assessments and levying the taxes; and the two contracts, Exhibit "F" and Exhibit "H" to the original bill.

There is no claim of any federal right or any right under any law of the United States asserted by the complainant anywhere in the bill of complaint.

It is the rule under the present removal statute, Section 71, U. S. C. A. Title 28, that the fact that a suit arises under the laws of the United States and is therefore removable must appear upon the face of the pleadings of the plaintiff. *The Fair v. Kohler Dye & Specialty Company,* 228 U. S. 22, 57 L. Ed. 716; 3 Supreme Court Reporter 410; *American Well Works Company v. Layne & Bowler Company,* 241 U. S. 257; 60 L. Ed. 987; *Great Northern Railway Company v. Alexander,* 246 U. S. 276; 62 L. Ed. 713; *Tennessee v. Union & Planters Bank* 152 U. S. 454; 38 L. Ed. 511.

The Circuit Court of Appeals while sustaining the validity of this rule denied its application in the instant case.

In the opinion by Mr. Justice Sibley, it is said: (Tr. 130).

> "****Although the new bank is alleged to be liable because of its contract, yet the State Tax Collector must and does assert also a tax claim collectible from the old bank. This in turn necessarily involves a construction and application of the laws of the United States, because the old bank was a national bank. **** The only authority to levy any such tax comes from the laws of Congress now expressed in 12 U. S. C. A., Section 548 (Citing cases). *** But Section 548 is not a limitation placed by the federal laws upon an antecedent right of the state to tax national banks, so as to be considered only a weapon of defense against such taxation. Both in form and in substance it is a grant of authority to state legislatures to tax such banks. *** The law of Mississippi, Code of 1930, Section 3138 adopts the plan of taxing the shares, both in state and national banks, on a return to be made by the president or cashier. *** Without stopping to construe these provisions further than to say they plainly pursue the permission of Section 548 to tax the shares of the shareholders, we assert that as to a national bank the state statute depends for its force on this law of the United States ****".

This, we most respectfully submit, is in direct conflict with the principles announced by this court in the case of *Porto Rico v. Russell & Company*, 228 U. S. 476; 77 Law Ed. 903, where it is said:

> "**** The suit was brought to recover assessments levied under the act of the Porto Rican legislature but not to enforce a right created by a law of the United States. No question of interpretation or enforcement

of the federal statute appears upon the face of the complaint. Federal jurisdiction may be invoked to vindicate a right or privilege claimed under the federal statute. It may not be invoked where the right asserted is non-federal, merely because the plaintiff's right to sue is derived from federal law, or because the property involved was obtained under federal statute. The federal nature of the right to be established is decisive—not the source of the authority to establish it. (Citing cases). The case is analogous to those involving rights to land granted under laws or treaties of the United States. Where the complaint shows only that such was the source of plaintiff's title, the case is not one within the jurisdiction of the federal courts ****".

We further most respectfully submit that the rule announced by the Circuit Court of Appeals herein is in conflict with the decision of this court in the case of *Shulthis v. MacDougald* 225 U. S. 561, 56 L. Ed. 205, where it is said in the opinion by Mr. Justice Van Devanter:

"Jurisdiction cannot rest upon any ground that is not affirmitatively and distinctly set forth (Citing cases).

"A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such laws, upon the determination of which the result depends". (Citing cases).

There is certainly no dispute or controversy respecting Section 5219 Revised Statute (Section 548 U. S. C. A. Title 12), or any other law of the United States even slightly sug-

gested in the petitioner's original bill filed in the state court.

We most respectfully submit there is further conflict between the decision of the Circuit Court of Appeals in this case and applicable decisions of this court on other points involved.

The Circuit Court of Appeals in effect held that the assessments involved in this suit and upon which the suit is predicated were invalid because made directly against the bank instead of against the individual stockholders. This holding is, we submit with deference, in conflict with *First National Bank v. Chehalis County,* 166 U. S. 440; 41 L. Ed. 1069; and *First National Bank v. Kentucky* 76 U. S. (9 Wall) 353; 19 L. Ed. 701.

The opinion of the Circuit Court of Appeals (Tr. page 136) states:

> "The amendment also set up that the stockholders of the old bank had assigned their shares for the benefit of the new bank under the agreement with an organization committee that the assignors 'be relieved and held harmless from any and all statutory liability as a shareholder of the First National Bank of Meridian, Mississippi' ".

The court is in error in saying that this allegation is contained in one of the proposed or attempted amendments which the District Court refused to allow. This allegation is set up in the original bill. (Tr. page 135 paragraphs 39 and 40).

The opinion further continues:

> "It is not pleaded how the new bank became bound by the contract of the committee".

This also is error for it is specifically and definitely pleaded in the original bill (Tr. Page 14, Par 41) that the bank became bound by "appropriate corporate action ratifying and confirming the actions of said committee". The court further continues in its opinion to hold that the reference in this contract is not to taxes which the shareholders might owe on their stock, but to their liability to be assessed on the stock to pay the banks debts under Section 64 U. S. C. A., Title 12.

This is, in effect, a holding that taxes are not a statutory liability because the contract, Exhibit "H", to the bill (Tr. page 51), provides that the stockholder is to be "relieved and held harmless from *any and all* statutory liability as a shareholder". This holding, in so far as it holds that taxes are not a statutory liability, is in direct conflict with the recent decision of this court rendered on December 9, 1935 in *Milwaukee County vs. White*, 296 U. S. 268; 80 L. Ed. 155 (Advance Sheet) where this court held specifically and in so many words that taxes are a statutory liability.

POINT 2.

Probable Conflict With Decisions of Other Circuit Courts of Appeals.

We most respectfully submit the decision of the Fifth Circuit Court of Appeals in this case is in conflict with the decision of the First Circuit Court of Appeals in the case of *Fourth Atlantic National Bank vs. City of Boston*, 300 Fed. 29.

There the suits, several of them, were filed in the U. S. Court challenging assessments made under the state bank taxing statute on the ground that "the defendant purporting to act under the laws of the State of Massachusetts, ** as-

sessed upon the shares of the plaintiff's stock a tax at a greater rate than was then assessed on moneyed capital in the hands of individual citizens of the State of Mass. and that the tax ** was assessed and collected without warrant of law and contrary to the constitution and laws of the United States."

The court in holding that these allegations were not sufficient to present a federal question upon which the jurisdiction of the court could rest, said:

> "It is elementary that 'where the existence of a federal question is essential to confer jurisdiction upon a trial court over a cause, the jurisdictional facts must be clearly and unambiguously alleged and not left to surmise and conjecture.' *Memphis v. Cumberland Telephone Co.*, 218 U. S. 264, 31 Sup. Ct. 115, 54 L. Ed. 1185. And we are of the opinion that in these cases the jurisdictional facts essential to confer jurisdiction upon the District Court are not clearly and unambiguously alleged in the declaration, but are left to surmise and conjecture".

There is also, we respectfully submit, serious conflict between this decision of the Fifth Circuit Court of Appeals in this case and the principles announced by the Fourth Circuit Court of Appeals in the case of *Thompson vs. Standard Oil Company*, 57 Federal (2d) 644, where it is said:

> "In short, the federal statutes contemplate that a suit shall be brought in or removed to a district court in the first instance only when 'the very foundation and support thereof' is a law of the United States, *Tennessee v. Bank of Commerce*, 152 U. S. 454, 462 14 S. Ct. 654, 657, 38 L. Ed 511, and that where a federal question is

> involved only by way of defense to a cause of action arising under state law, whether pleaded by the defendant or arising as a matter of law upon the statement of the plaintiff's case, that question must be passed upon in the first instance by the state courts. These decisions, however, in most cases are not final when federal questions are involved, for broad powers of review, either by writ of error, or certiorari, are conferred upon the Supreme Court of the United States by Section 237 of the Judicial Code, 28 U. S. C. A., paragraph 344, when the rights of litigants resting upon federal enactments are denied by state tribunals".

There is also a conflict between this decision in so far as it holds the assessments invalid because made directly to the bank instead of the individual stockholders and the decision of the Tenth Circuit Court of Appeals in the case of *South Broadway National Bank vs. City and County of Denver,* 51 Federal (2d) 703, where that court approved an assessment made as the one here was made directly against the bank insolido.

POINT 3.

Probable Conflict With Applicable Local Laws.

The holding of the Fifth Circuit Court of Appeals in this case to the effect that the assessments involved were invalid because made directly against the bank instead of against the individual shareholders was in conflict with the applicable local law of the State of Mississippi, both statutory and judicial, in this:

Section 3120 of the Mississippi Code of 1930 provides:

> "*** It shall not be necessary to the validity of an

assessment ** that it shall be assessed to its true owner; but the taxes shall be a charge on the land or personal property taxed *** without regard to who may own the land or other property, when assessed or when sold, or whether wrongfully assessed ***."

And in Section 3122 of the Mississippi Code of 1930, we find:

"Every lawful tax assessed, levied or imposed by the state or any county, municipality, or levy board, whether ad valorem, privilege, excise, income or inheritance, is a debt due by the person or corporation owning the property or carrying on the business or profession upon which the tax is levied or imposed, whether properly assessed or not *** and may be recovered by action".

The Supreme Court of Mississippi has specifically held that the ownership shown on the assessment roll is immaterial. *Smith v. Cassidy* 75 Miss. 916, 23 So. 427.

And that an assessment made to an unknown owner is valid. *Powell vs. McKee,* 81 Miss. 229, 32 So. 919. The Court there said:

"It must be confessed that personalty is usually and almost always assessed to the owner because the owner is generally known, but there is no incongruity or hardship in assessing it to the unknown owner."

POINT 4.

Departure From Established Legal Principles Authority.

We most respectfully submit that the Circuit Court of Appeals has in this case so far sanctioned the action of the

District Court in its departure from established principles and authority governing the question of the jurisdiction of removal cases as to render it necessary and requisite for this court to exercise its supervisory power to correct the erroneous holding.

The effect of the decision in this case is to establish the rule that all suits involving the taxation of a national bank by a state are suits arising under the laws of the United States and therefore removable in the first instance to the United States Court.

Congress has defined its policy with reference to the jurisdiction of the United States Courts in suits involving national banking associations in Section 41 (16) U. S. C. A. Title 28 as follows:

> "Of all cases commenced by the United States or by direction of any officer thereof against any national banking association and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of Chapter 2 of Title 12, to enjoin the comptroller of the currency, or any receiver acting under his direction, as provided by said chapter. *And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located.*"

To approve and sustain the action and holding of the Circuit Court of Appeals in this case is to ingraft an excep-

tion upon or add an additional class of suits to such jurisdiction provided for in this statute.

This court in the case of *Shoshone Mining Company vs. Rutter* 177 U. S. 505, 44 L. Ed. 865 and in an opinion by Mr. Justice Brewer in discussing the proposition with reference to jurisdiction of the United States Court in mining claims, used the following language which is equally applicable, we submit, to the question here. The Court there said:

> "The question, therefore, is not one of the power of Congress but of its intent. It has so constructed the judicial system of the United States that the great bulk of litigation respecting rights of property, although those rights may in their inception go back to some law of the United States, is in fact carried on in the courts of the several states. It has provided that the federal courts shall have exclusive jurisdiction of admiralty and patent litigation and jurisdiction concurrent with the state courts of suits arising under the Constitution and laws of the United States. **** When in Section 2326 Revised Statutes Congress authorized that which is familiarly known in a mining region as an 'adverse suit,' it simply declared that the adverse claimant should commence proceedings 'in a court of competent jurisdiction.' It did not in express language prescribe either a federal or a state court, and did not provide for exclusive or concurrent jurisdiction. If it had intended that the jurisdiction should be vested only in the Federal courts, it would undoubtedly have said so. If it had intended that any new rule of demarcation between the jurisdiction of the Federal and state courts should apply, it would likewise undoubtedly have said so. Leaving the matter as it did, it unquestionably meant that the com-

petency of the court should be determined by rules theretofore prescribed in respect to the jurisdiction of the Federal courts ****.

"We pointed out in the former opinion that it was well settled that a suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the Constitution or laws of the United States within the meaning of the jurisdictional clauses."

We have examined the reported cases carefully and we have not found a reported decision from any appellate court heretofore holding as the Circuit Court of Appeals holds in this case that all suits involving taxation by a state of a national bank are removable in the first instance to the United States District Court as suits arising under the laws of the United States. The six cases cited by the Circuit Court of Appeals on this point, to wit, *McCulloch vs. Maryland*, 4 Wheat. 316; *Owensboro National Bank vs. Owensboro*, 173 U. S. 664; *First National Bank of Gulfport vs. Adams*, 258 U. S. 362; *Des Moines National Bank vs. Fairweather*, 263, U. S. 103; *First National Bank of Guthrie vs. Anderson*, 269 U. S. 341; and *Domenech vs. National City Bank*, 294 U. S. 199, were all except the last one, suits which were instituted in state courts and prosecuted through the highest courts of the state and then removed by certiorari or writ of error to the Supreme Court of the United States. The last case, that of *Domenech vs. National City Bank*, was filed originally in the United States District Court.

CONCLUSION

We, therefore, most respectfully submit in conclusion, that this case was not one properly removable from the state court and that, therefore, the District Court did not have jurisdiction thereof and should have remanded it to the state court, and the Circuit Court of Appeals erred in affirming the District Court in this regard, and that the original bill stated under the applicable local laws a valid cause of action and should not have been dismissed and, therefore, for these reasons, we respecfully submit that certiorari herein is necessary and requisite in order that the petitioner may obtain the relief to which he is entitled.

Respectfully submitted,

J. C. FLOYD,

Attorney for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

NO. 29

JAMES B. GULLY, STATE TAX COLLECTOR FOR THE STATE OF MISSISSIPPI,.....Petitioner

vs.

FIRST NATIONAL BANK IN MERIDIAN

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

ORIGINAL BRIEF FOR PETITIONER

May It Please the Court:

Certiorari was granted herein by this court to the United States Circuit Court of Appeals for the Fifth Circuit on May 18, 1936.

This petition is prosecuted by James B. Gully, State Tax Collector, for the State of Mississippi, for the use and benefit of that state and certain of its political subdivisions and taxing

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NOTE:—All *Italics* ours unless otherwise indicated.

districts, in an effort to secure a reversal of a judgment of the Fifth Circuit Court of Appeals, affirming an order of the United States District Court for the Eastern Division of the Southern District of Mississippi overruling petitioner's motion to remand this cause, for lack of jurisdiction, to the state court where it originated.

I

OPINIONS OF THE COURTS BELOW

The District Court rendered no written opinion but included in its final decree certain conclusions of law (Tr. page 84).

The opinion of the Circuit Court of Appeals appears in the record (Tr. page 93), and is reported in 81 Federal (2d) 502.

II

JURISDICTION

(1) The date of the judgment of the Circuit Court of Appeals sought to be reviewed is January 18, 1936.

(2) Jurisdiction is invoked under Section 240 of the Judicial Code, as amended (Section 347 U. S. C. A., title 28).

(3) Jurisdiction is sustained by *Forsythe v. Hammond*, 166 U. S. 507, 41 L. Ed. 1095; *Hamilton Brown Shoe Company v. Wolf Bros. Company*, 40 U. S. 251, 60 L. Ed. 629; *Gay v. Ruff* 292 U. S. 25, L. Ed. 1099,

(4) Certiorari was granted herein on May 18, 1936. (Tr. page 103).

III

STATEMENT OF THE CASE

The cause was decided in the District Court on the plead-

ings, upon a motion to remand and a motion to dismiss. The averred facts found in the bill of complaint, pertinent to this petition, as limited in the order granting certorari, briefly stated, are these:

For many years prior to January 13, 1931, the First National Bank *of* Meridian was a national banking association, domiciled and operating in Meridian, Lauderdale County, Mississippi. (Tr. page 2, Par. 6).

During the year 1930, and within the time specified by law, which was on or before April 1, the proper officer of the bank undertook to make a return for the purpose of assessment for taxation to both the municipal assessor, whose duty it was to assess property for the City of Meridian, and the Meridian Separate School District, and to the County Assessor, whose duty it was to assess property for Lauderdale County and the State of Mississippi, showing the bank's capital stock of $260,000, surplus and undivided profit of $313,890 less real estate, $33,700, or a total taxable property of $540,190,00. (Tr. page 2, par. 8, page 6, par. 21; pages 76, 77, 78, and 79).

The tax assessors copied in exact form the returns as made upon their respective assessment rolls. Neither the returns nor the assessments showd the names of the various individual stockholders, but showed the assessment to be against the bank. Since the law required the bank, as agent for its stockholders, to make the return and pay the tax, for a long period of years prior to 1930 the bank had made its returns in the exact forms of these returns, and the assessment had been made in the exact form of these assessments, and the bank had paid the taxes. (Tr. page 78).

The statutatory procedure required for the filing of the assessment rolls, the notice of the equalization meeting for correction of any assessments, and final approval of the rolls were complied with. (Tr. page 3, par. 10, et seq.)

The bank, nor any person for it, did not file objections to the assessments as made, and no appeal as provided for by law was taken from the assessments.

During the year, before and after the taxes became due and payable on December 1, 1930, the bank had dividends and other monies belonging to each and every one of the shareholders in its hands more than sufficient to pay each shareholder's pro rata part of the tax. (Tr. page 5, par. 19; page 9, par. 31).

The total amount of the taxes due by the assessments to all of the taxing districts, as of December 1, 1930, was $26,469.99. (Tr. page 4, par. 14 and 15; page 5, pars. 26 and 27).

The taxes were not paid and on January 13, 1931, the First National Bank *of* Meridian closed its doors and passed into the hands of a Receiver under the directions of the Comptroller of the Currency (Tr. page 10, par. 33).

The new bank was organized under the name of First National Bank *in* Meridian, and a contract was made between the new bank and the Receiver, whereby under the construction of the terms of the contract as contended for by petitioner, in consideration of a transfer of practically all the assets of the old bank, the new bank agreed to "assume and pay in full with interest the claims of all other creditors against said suspended bank, whether said claims be known or unknown, which may be duly established according to law". (Tr. page 10, par. 35 and 36).

No schedule of claims was attached to the contract.

The new bank for some reason desiring to obtain the outstanding capital stock of the old bank entered into a contract with all of the shareholders of the old bank for a purchase of the stock, and as consideration for its transfer agreed to "relieve the shareholders of the First National Bank *of* Meridian

from any and all statutory liability imposed upon them as shareholders, in said suspended bank". (Tr. page 10, par. 39; pages 39, 40.)

The First National Bank *in* Meridian having failed, refused, and neglected to pay the taxes claimed to be due by it by reason of the foregoing assessments and contracts, this suit was filed on August 1, 1933 in the Chancery Court of Lauderdale County, Mississippi by James B. Gully, State Tax Collector, for the use and benefit of the various taxing districts.

The defendant filed in the state court a petition and bond for removal of the cause to the United States District Court. (Tr. page 40).

After the transcript had been filed in the District Court, the Complainant made a motion to remand the cause to the state court on the ground that the District Court was without jurisdiction. The motion to remand was overruled. (Tr. page 47).

The cause then came on for hearing on the motion to dismiss filed by the defendant,

The motion to dismiss was sustained, the original bill dismissed. The complainant, petitioner here, prosecuted an appeal to the Fifth Circuit Court of Appeals. The orders of the District Court were affirmed.

The removal petition filed by the defendant in error in the state court sought removal of the cause to the United States District Court on two (2) grounds, i. e. (1) that the suit was one of a civil nature arising under the laws of the United States of America, and (2) that the suit was for the winding up of the affairs of an insolvent national bank.

The Circuit Court of Appeals held in accord with petitioner's contention that the second ground assigned was not well taken (Tr. 98), but sustained the removal upon the other ground, i. e., that the suit was one arising under the laws of the United States.

The bill of complaint discloses that it is a suit brought by J. B. Gully, the State Tax Collector for the State of Mississippi, for taxes due the State of Mississippi, and its political subdivisions (Tr. page 1, par. 1);

That it is a suit brought against only one defendant, The First National Bank *in* Meridian, a national banking association domiciled in Meridian, Mississippi. (Tr. page 1, par. 2.);

That it is a suit seeking to collect taxes alleged to be due the County of Lauderdale, imposed by order of its board of supervisors (Tr. page 4, par. 12), the State of Mississippi imposed by Act of the Legislature (Tr. page 4, par. 13), the City of Meridian imposed by municipal ordinance (Tr. page 7, par. 24), and the Meridian Separate School District imposed by ordinance (Tr. page 8, par. 25).

The bill further discloses by allegation of the complainant, that although the liability and obligation for the taxes so imposed and sued for originally rested upon the shareholders of the First National Bank *of* Meridian, because of certain acts and omissions of the First National Bank *of* Meridian, and certain statutory or legal obligations imposed by the State of Mississippi resting upon it, that the obligations became that of the First National Bank *of* Meridian (Tr. page 5, par. 16, 18, 19 and 20; Tr. page 8, par. 28, 29, 30, 31, and 32; Tr. pages 76, 77, 78 and 79.)

That the obligation and liability of the defendant First National Bank *in* Meridian to pay the taxes is created by its contract with the Receiver, Exhibit "F" (Tr. page 28) and its contract with the stockholders, Exhibit "H" (Tr. page 39).

IV

SPECIFICATIONS OF ERROR

(1) The Circuit Court of Appeals erred in affirming the decree of the District Court and denying the petitioner relief, because;

(a) The cause was improperly removed from the state court and should have been remanded.

V

ARGUMENT

POINT 1.

NOT A SUIT ARISING UNDER THE LAWS OF THE UNITED STATES

We most respectfully submit that this cause was not removable from the state court, where it was instituted, to the United States District Court.

The cause of action set forth in the bill of complaint upon which recovery is sought is based upon and arises under the provisions of Section 6991 of the Mississippi Code of 1930, making it the duty of the State Tax Collector to collect taxes where property has escaped taxation; the provisions of Section 3138 of the Mississippi Code of 1930 providing for the assessment of taxes against banks, especially banking associations, existing under the laws of the United States; the various orders of the local boards and the state statute making the assessments and levying the taxes; and the two contracts, Exhibit "F" and Exhibit "H" to the original bill.

There is no claim of any federal right or any right under any law of the United States asserted by the complainant anywhere in the bill of complaint.

In other words, the whole proceeding of the State Tax Collector, in the instant case, is under the laws of the State of Mississippi, and the fact that these laws, or the assessments made thereunder, may conflict with the provisions of Title 12, U. S. C. A., Section 548, either in themselves or in their application, cannot under the authorities create a controversy arising under the Constitution and laws of the United States.

The removal statute, Title 28, U. S. C. A., Section 71, provides as follows:

"Any suit of a civil nature, at law or in equity, *arising under the Constitution or laws of the United States*, or treaties made, or which shall be made under their authority, of which the district courts of the United States are given original jurisdiction, in any state court may be removed by the defendant or defendants therein to the District Court of the United States for the proper district, etc."

It is the rule under the present removal statute, Section 71, U. S. C. A., Title 28, that the fact that a suit arises under the laws of the United States and is therefore removable must appear upon the face of the pleadings of the plaintiff. The *Fair v. Kohler Dye & Specialty Company*, 228 U. S. 22, 57 L. E. 716; 33 Supreme Court Reporter 410; *American Well Works Company v. Layne & Bowler Company*, 241 U. S. 257; 60 L. Ed. 987; *Great Northern Railway Company v. Alexander*, 246 U. S. 276; 62 L. Ed. 713; *Tennessee v. Union & Planters Bank* 152 U. S. 454, 38 L. Ed. 511.

The Circuit Court of Appeals while sustaining the validity of this rule denied its application in the instant case. In the opinion of Mr. Justice Sibley, it is said: (Tr. 130).

"*** Although the new bank is alleged to be liable because of its contract, yet the State Tax Collector must and does assert also a tax claim collectible from the old bank. This in turn necessarily involves a construction and application of the laws of the United States, because the old bank was a national bank.

**** The only authority to levy any such tax comes from the laws of Congress now expressed in 12 U. S. C. A., Section 548 (Citing cases). ** But Section 548 is not a limitation placed by the federal laws upon an antecedent right of the state to tax national banks, so as to be considered only a weapon of defense against such taxation. Both in form and in substance it is a grant of au-

thority to state legislatures to tax such banks.***The law of Mississippi, Code of 1930, Section 3138 adopts the plan of taking the shares, both in state and national banks, on a return to be made by the president or cashier. *** without stopping to construe these provisions further than to say they plainly pursue the permission of Section 548 to tax the shares of the shareholders, we assert that as to a national bank the state statute depends for its force on this law of the United States *****".

This, we most respectfully submit, is in direct conflict with the principles announced by this court in the case of *Puerto Rico v. Russell & Company*, 228 U. S. 476; 77 Law Ed. 903, where it is said:

"**** The suit was brought to recover assessments levied under the act of the Puerto Rican legislature but not to enforce a right created by a law of the United States. No question of interpretation or enforcement of the federal statute appears upon the face of the complaint. Federal jurisdiction may be invoked to vindicate a right or privilege claimed under the federal statute. It may not be invoked where the right asserted is non-federal, merely because the plaintiff's right to sue is derived from federal law, or because the property involved was obtained under federal statute. The federal nature of the right to be established is decisive - not the source of the authority to establish it. (Citing cases). The case is analogous to those involving rights to land granted under laws or treaties of the United States. Where the complaint shows only that such was the source of plaintiff's title, the case is not one within the jurisdiction of the federal courts ***".

The effect of the decision of the Circuit Court of Appeals in this case is to establish the rule that all suits involving the taxation of a national bank by a state are suits arising under

the laws of the United States and, therefore, removable in the first instance to the United States Court.

Congress has defined its policy with reference to the jurisdiction of the United States Courts in suits involving national banking associations in Section 41 (16) U. S. C. A. Title 28, as follows:

> "Of all cases commenced by the United States or by direction of any banking association and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of Chapter 2 of Title 12, to enjoin the comptroller of the currency, or any receiver acting under his direction, as provided by said chapter. *And all national banking associations established under the laws of the United States shall, for the purpose of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located.*"

To approve and sustain the action and holding of the Circuit Court of Appeals in this case is to ingraft an exception upon or add an additional class of suits to such jurisdiction provided for in this statute.

This court in the case of *Shoshone Mining Company vs. Rutter*, 177 U. S. 505, 44 L. Ed. 865 and in an opinion by Mr. Justice Brewer in discussing the proposition with reference to jurisdiction of the United States Court in mining claims, used the following language which is equally applicable, we submit, to the question here. The Court there said:

> "The question, therefore, is not one of the power of Congress but of its intent. It has so constructed the judicial system of the United States that the great bulk of litigation respecting rights of property, although those rights may in their inception go back to some law of the United States, is in fact carried on in the courts of the

several states. It has provided that the federal courts shall have exclusive jurisdiction of admiralty and patent litigation and jurisdiction concurrent with the state courts of suits arising under the Constitution and laws of the United States. *** When in Section 2326 Revised Statutes Congress authorized that which is familiarly known in a mining region as an 'adverse suit,' it simply declared that the adverse claimant should commence proceedings 'in a court of competent jurisdiction.' It did not in express language prescribe either a federal or a state court, and did not provide for exclusive or concurrent jurisdiction. If it had intended that the jurisdiction should be vested only in the Federal courts, it would undoubtedly have said so. If it had intended that any new rule of demarcation between the jurisdiction of the Federal and state courts should apply, it would likewise undoubtedly have said so. Leaving the matter as it did, it unquestionably meant that the competency of the court should be determined by rules theretofore prescribed in respect to the jurisdiction of the Federal courts****.

"We pointed out in the former opinion that it was well settled that a suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the Constitution or laws of the United States within the meaning of the jurisdictional clauses".

It is the contention of respondent, and the Circuit Court of Appeals so held, that this must be a suit arising under the laws of the United States, because, but for Section 548 U. S. C. A., Title 12, (5219 R. S.), the suit could never have arisen at all.

It could be argued with the same force that but for the laws of the United States granting the lands, the suit of *Shoshone Mining Company v. Rutter*, supra, would never have arisen, and but for the laws of the United States authorizing the suits in *Puerto Rico v. Russell*, supra, that suit would never have arisen.

While the Circuit Court of Appeals did not refer to the case of *City of Hattiesburg v. First National Bank of Hattiesburg*, 8 Fed. Supp. 157, yet counsel for the bank relied upon it very strongly in their brief in that court and the Circuit Court of Appeals followed it. We anticipate they will again rely upon that case. In that case the District Court, while recognizing and stating the rule that a federal question which arises as a matter of defense only is not sufficient ground for removal, held that a proceeding to tax a national bank necessarily relied upon the federal statute as authority for such tax and was removable as soon as it was appealed to the Circuit Court of the state.

We respectfully say that the District Court was mistaken. The State of Mississippi is a sovereign. One of the essential attributes of this sovereignty is the power of taxation. Without reference to any law, statute or constitution, the State of Mississippi is possessed of the inherent and essential soverign power to tax all property and persons within its territorial limits. Of course this power may be limited by its own constitution or by the Constitution of the United States. In this case it is unquestionably limited by the Constitution of the United States as construed by this court and by the legislation enacted by Congress under authority thereof. But the power is not created by either the Constitution of the United States or any statutes enacted by Congress.

In this case we are asserting the right to tax the shareholders of the First National Bank *of* Meridian under authority of the statutes enacted by the Legislature of the sovereign State of Mississippi. If there were no constitution of the United States and no acts of Congress, the power of the state would be unquestioned. But there does exist a constitution of the United States, as well as various statutes of the United States, which the defendant bank seeks to plead as a defense to this suit. The Federal constitution and statutes are defensive matter.

Let us assume that no court had ever held that a national bank is an agency of the United States and that no court had ever held that the federal constitution which creates the United State as a sovereign impliedly prohibits the several states from taxing agencies of the United States. In such a case if the State of Mississippi undertook to tax a national bank and the bank resisted the collection thereof, asserting that it was an agency of the United States and that the federal constitution prohibited a state from taxing such an agency, would not the contention of the bank be held to be a *defense* based upon the Constitution and laws of the United States? Does the fact that these two points have long since been decided by this court render them any the less matters of *defense?* We are sure that they were considered as defensive matter in *McCulloch v. Maryland* (4 Wheat. 316) and in *Osborn v. Bank of the United States* (9 Wheat, 738).

No one would contend, we are sure, that in the absence of the Mississippi taxing laws here involved this suit could be maintained under the Federal Statute. Section 548 U. S. C. A., Title 12 (5219 R. S.) does not levy any tax or create any cause of action. The rights here asserted, if they exist at all, arise under the laws of Mississippi.

In the case of *American Well Works Company v. Layne & Bowler Company, et al*, 241 U. S. 257, 60 L. Ed. 987, the plaintiff filed a suit in a state court which was removed to the district court and on motion to remand by the plaintiff was dismissed by the district court on the ground that the cause of action arose under the patent laws of the United States, and that the state court had no jurisdiction and that, therefore, the one to which it was removed had none. Mr. Justice Holmes in delivering the opinion of the Court says:

> "Of course, the question depends upon the plaintiff's declaration. *The Fair v. Kohler Dye & Specialty Company*, 288 U. S. 22, 25, 57 L. Ed. 716, 717, 33 S. Ct. Rep. 410.

"A suit arises under the law that creates the cause of action. The fact that the justification may involve the validity and infringement of a patent is no more material to the question under what law the suit is brought than it would be in an action of contract.***The state is master of the whole matter, and if it saw fit to do away with actions of this type altogether, no one, we imagine, would suppose that they still could be maintained under the patent laws of the United States."

This court in the case of *Shulthis v. MacDougald* 225 U. S. 561, 56 L. Ed. 205, said, in the opinion by Mr. Justice Van Devanter:

"Jurisdiction cannot rest upon any ground that is not affirmatively and distinctly set forth (Citing cases).

"A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such laws, upon the determination of which the result depends". (Citing cases).

There is certainly no dispute or controversy respecting Section 5219 Revised Statute (Section 548 U. S. C. A. Title 12), or any other law of the United States even slightly suggested in the petitioner's original bill filed in the state court.

The sole authority for this suit by the State Tax Collector is the state law as hereinabove pointed out. It is true that the federal government has permitted the assessment with certain restrictions but the authority exercised herein arises under the state law and is asserted by state officers acting solely under authority of the state law. If, per chance, in exercising the authority vested in the various state officers in making the assessment involved federal statutes have been violated, that vio-

lation is essentially defensive—perhaps unnecessary for decision to be considered—and certainly the existence of a federal question does not appear from the original proceedings instituted by the State Tax Collector.

It may be conceded that the limitation to tax placed upon a state by Section 548 of Title 12, U. S. C. A. (Sec. 5219 R. S.) should be interpolated into Section 3138 of the Mississippi Code of 1930 in arriving at a proper construction of the Mississippi Bank Taxing statute, but even then we are far from the proposition that all suits involving taxation of a national bank in this state are suits arising under the laws of the United States.

In the language of Justice Holmes, in his dissenting opinion in *Smith v. Kansas City Title & Trust Company*, 255 U. S. 180, 65 L. Ed. 577:

> "The mere adoption by a state law of a U. S. law as a criterion or test when the law of the U. S. has no force proprio vigore, does not cause a case under the state law to be also a case under the law of the U. S., and so it has been decided by this court again and again. *Miller v. Swan (Miller v. Anderson)* 150 U. S. 132, 37 L. Ed. 1028; *L. & N. Ry. Co. v. Western Union* 237 U. S. 300, 59 L. Ed. 965; *Shoshone v. Rutler*, 177 U. S. 505, 44 L. Ed. 865*** A suit arises under the law that created the cause of action *American Well Works v. Layne*, 241 U. S. 257, 60 L. Ed. 987."

In *Minnesota v. Northern Securities Company, et al.* 194 U. S. 48, 48 L. Ed. 870, there was a suit instituted by the State of Minnesota in one of its own courts against several corporations under certain statutes of the State of Minnesota, alleging that said corporations had created a trust and combine, violative of the Minnesota statutes, and that if such combine was allowed to continue and exist "full faith and credit will not be given to the public acts of this complainant, and it will be deprived of a

further right guaranteed to it by the Constitution of the United States." The complainant further alleged that "by reason thereof all competition between said line has been destroyed and a monopoly in railway traffic in Minnesota, (as well as without said state), has been created, to the great and permanent and irreparable damage of the State of Minnesota, and to the people thereof, and in violation of its laws, and of the laws of the United States in such cases made and provided, viz; The Act of Congress approved July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies' (26 St. at L. 209, Chap. 647, U. S. Comp. Stat. 1901, p. 3200) and that said corporation should be restrained from continuing such monopoly. The bill prayed for a decree declaring the monoply unlawful and all acts done in pursuance thereof contrary to and in violation of the laws of Minnesota and of the United States and for other relief.

The Securities Company appeared specially and filed its petition for removal upon the ground that the suit was of a civil nature, in equity, above the jurisdictional amount and "was one arising under the Constitution and laws of the United States." The cause was accordingly removed to the Federal Court. Thereafter, proofs were taken and the cause having been heard the bill was dismissed upon the merits. 123 Fed. 692. After the cause was argued, briefs were requested as to whether the Circuit Court could take cognizance of the case removed from the state court. Both sides considered the case removable and insisted that the court should consider the merits as disclosed by the pleadings and evidence. The Supreme Court pointed out, however, that consent of parties cannot confer jurisdiction upon a federal court, but that the record must affirmatively show jurisdiction and unless it does so show, it is the duty of the Federal Court to so declare and to make such order as will prevent the Federal Court from exercising an authority not conferred upon it by statute. The Supreme Court then proceeded to inquire into whether the Circuit Court could take cognizance of the case

upon removal from the State Court and make a final decree upon the merits, and concluded that the decree of the Circuit Court should be reversed, the case sent back with directions to be remanded to the State Court. Mr. Justice Harlan discusses many of the cases from which we have quoted above to the effect that it must appear from the outset and on the face of the original complaint that the suit is one involving a federal question, where it is the sole ground of removal. It was there insisted that, because on the face of this complaint the state sought to enforce the anti-trust act of Congress, a Federal question was involved.

Again, in the case of In Re: *Winn*, 213 U. S. 458, 53 L. Ed. 873, there was an original application for a writ of mandamus to compel the District Judge of the United States for the Southern District of Iowa, Central Division, acting as Circuit Judge, to remand the case to the state court in which it was originally brought. There was a suit by Winn against The American Express Company for injury to property, which suit was filed in a high state court. The defendant filed a petition to remove to the Federal Court and the petition was denied by the state Court. Thereafter, the defendant filed a copy of the record in the Federal Court and the plaintiff moved to remand. The motion was denied by the Circuit Judge. The plaintiff thereupon without further action in the Circuit Court began the proceeding for a writ of mandamus. The petition for removal alleged that the plaintiff was a citizen of Missouri and the defendant a joint stock association, organized under the laws of New York, but contained no allegation of the citizenship of the members of the association, and the diversity of citizenship did not appear. The petition for removal was based upon the ground that the suit was one arising under the laws of the United States. The Court held that a cause could not be removed to the Federal Court unless it could be originally brought there, and upon the question of removal states the principle as follows:

"The only ground of jurisdiction which is, or can be suggested is that the suit was one arising under the Constitution and the Laws of the United States.***It is the settled interpretation of these words, as used in this statute conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough, as the law now exists, that it appears that the defendant may find in the Constitution or laws of the United States some ground of defense. *Louisville & N. R. R. Co. v. Mottley*, 211 U. S., 149, 29 Sup. Ct. 42, 53 L. Ed. 126, and cases cited. If the defendant has any such defense to the plaintiff's claim, it may be set up in the state courts and, if properly set up and denied by the highest court of the state, may ultimately be brought to this court for decision."

In that case, in the petition for removal, the defendant alleged that it was subject to the federal laws to regulate commerce and that under those laws the defendant had a defense, in whole or in part, to the cause of action stated in the declaration, but the cause of action itself was not based upon the interstate commerce law, or upon any other law of the United States. The cause could not have been brought originally in the Circuit Court of the United States and was, therefore, held to be not removable thereto, and the Court, on this state of facts, held as quoted above and that the lower court erred in refusing to remand the cause, and the writ of mandamus was awarded.

Title 12 U. S. C. A. Section 94 provides:

"Actions and proceedings against any association under this chapter (Banks and Banking) may be had in any district or territorial court of the United States held within the district in which such association may be established or in any state, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

From the foregoing we take it that there is no question but that the state courts and the federal courts have concurrent jurisdiction in all matters affecting national banking associations, except where, as indicated, the federal courts are given exclusive jurisdiction by the Constitution or the Acts of Congress.

In *Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, we find:

> "While the state has no power to enact legislation contravening the Federal Laws for the control of national banks***Congress has provided, that for actions against them at law or in equity, they shall be deemed citizens of the state in which they are located, and that in such cases the Circuit and District Courts of the United States shall have such jurisdiction only as they would have in cases between individual citizens of the same state."

Compare:

Schuyler National Bank v. Bolling, 150 U. S. 85, 37 L. Ed. 1008;

New Orleans National Banking Association v. Adams, 3 Woods, 21, 17 Fed. Cas. No. 10184.

The contention here made by the respondent was fairly presented to, and decided by the First Circuit Court of Appeals in *Fourth Atlantic National Bank v. City of Boston*, 300 Federal 29.

There the suits, several of them, were filed in the U. S. Court challenging assessments made under the state bank taxing statute on the ground that "the defendant purporting to act under the laws of the State of Massachusetts, **assessed upon the shares of the plaintiff's stock a tax at a greater rate than was then assessed on moneyed capital in the hands of individual citizens of the State of Massachusetts and that the tax***was ass-

essed and collected without warrant of law and contrary to the constitution and laws of the United States".

The Court in holding that these allegations were not sufficient to present a federal question upon which the jurisdiction of the court could rest, said:

> "It is elementary that 'where the existence of a federal question is essential to confer jurisdiction upon a trial court over a cause, the jurisdictional facts must be clearly and unambiguously alleged and not be left to surmise and conjecture.' *Memphis v. Cumberland Telephone Co.*, 218 U. S. 264, 31 Sup. Ct. 115, 54 L. Ed. 1185. And we are of the opinion that in these cases the jurisdictional facts essential to confer jurisdiction upon the District Court are not clearly and unambiguously alleged in the declaration, but are left to surmise and conjecture".

The respondent also contends that because the contract between the Receiver of the old bank and the respondent, Exhibit "F," (Tr. page 28) forms in part a basis of the alleged liability of the respondent, which contract was authorized by the District Court, that thereby the cause of action arises under the laws of the United States.

Carson v. Dunham, 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. Ed. 992, the opinion which was delivered by Chief Justice Waite, was a case on appeal from the Circuit Court of the United States for the District of South Carolina, from an order of the Circuit Court remanding the suit which had been removed from a state court. The record in the case disclosed that the appellee had filed a bill in equity in the State Court to foreclose a mortgage, which had been assigned to the appellee. In the petition, it was alleged that Mrs. Carson was in possession of the mortgaged property. On the day that service on her was completed, Mrs. Carson entered her appearance in the state court and filed a petition for removal of the suit to the Circuit Court, asserting, among other grounds, that the controversy called into consider-

ation matters that had already been adjudged in favor of Mrs. Carson, by the Circuit Court of the United States for South Carolina, and that the state court was without jurisdiction because a like suit was then pending in the United States Court and that the property was in possession of a receiver appointed by said Federal Court, asserting that the matter presented a controversy arising under a decision of a federal court and therefore presented a federal question. The order remanding the case was affirmed.

This authority, we submit, completely puts to rest the contention of counsel for defendant in error that because the contract between the defendant and the Receiver was made under authority of an order of the District Court approving it, and such contract forms, in part, the basis of alleged liability of the defendant, that thereby the suit arises under the laws of the United States.

Also compare:

Provident Sav. et al v. Ford, 114 U. S., 635

Starin v. New York City, 115 U. S. 257.

Respondent will, no doubt, contend, as it did in the Circuit Court of Appeals, and in its brief in opposition to the petition for certiorari, that this petitioner is estopped to contend that he does not rely upon the laws of the United States because, after the District Court had sustained the motion to dismiss, the petitioner presented a proposed amendment wherein the words, "laws of the State of Mississippi and of the United States" appeared. (Tr. page 76). It would seem to us to be a sufficient answer to this contention to say that the respondent is estopped to say that we are estopped, for the reason that it objected to the proposed amendment. (Tr. page 80). At any rate, the amendments were not allowed by the District Court. (Tr. page 85).

Under the authorities heretofore cited, even the addition of these words in the bill of complaint would not have made one arising under the laws of the United States.

The case of *Henderson v. Maryland Casualty Company* (Fifth Circuit) 62 Federal (2d) 107, is not an authority for the respondent on this point, for the reason that there the amendments were allowed by the court, which amendments were held to convert the cause into a removable one.

We have examined the reported cases carefully and we have not found a reported decision from any appellate court heretofore holding as the Circuit Court of Appeals holds in this case that all suits involving taxation by a state of a national bank are removable in the first instance to the United States District Court as suits arising under the laws of the United States. The six cases cited by the Circuit Court of Appeals on this point, to wit, *McCulloch v. Maryland*, 4 Wheat. 316; *Owensboro National Bank v. Owensboro*, 173 U. S. 664; *First National Bank of Gulfport v. Adams*, 258 U. S. 362; *Des Moines National Bank v. Fairweather* 263 U. S. 103; *First National Bank of Guthrie v. Anderson*, 269 U. S. 341; and *Domenech v. National City Bank*, 294 U. S. 199, were all, except the last one, suits which were instituted in state Courts and prosecuted through the highest courts of the state and then removed by certiorari or writ of error to the Supreme Court of the United States. The last case, that of *Domenech v. National City Bank*, was filed originally in the United States District Court.

POINT 2

NOT A SUIT FOR THE WINDING UP OF THE AFFAIRS OF A NATIONAL BANK.

As heretofore shown, the petition for removal also assigned as an additional ground that this was a suit for the winding up of the affairs of a national bank. (Tr. page 42).

The Circuit Court of Appeals in its opinion, held with this petitioner on this point, and held that it was not a suit to wind up the affairs of a national bank (Tr. page 98) and in this, we submit, the court was correct for the reasons assigned.

There was no cross petition by the respondent herein, but we shall discuss briefly this point.

It is difficult to understand how, under any construction, the case here made by the averments of the bill of complaint might be designated as "a suit to wind up the affairs of a national bank". Certainly, it is not a suit to wind up the affairs of the defendant national bank, and certainly the defendant is not the Receiver nor the Statutory Agent of the stockholders of the old First National Bank *of* Meridian. Neither the Receiver, nor the statutory agent of the stockholders, if there be one, of the old bank is defendant to the suit.

The affairs of the old First National Bank *of* Meridian were wound up, presumably, by the Receiver, and this is a suit against another national bank which happened to have acquired the assets and, as contended by the complainant, the liabilities of the old First National Bank *of* Meridian.

This suit, we submit with deference, is no more a suit to wind up the affairs of the old First National Bank than a suit to cancel a note and deed of trust formerly owned by the old bank and acquired by the new bank in the transfer of assets would be. In other words, it is our contention that it cannot be the rule that any litigation involving any of the assets or liabilities formerly belonging to the old bank constitutes litigation to wind up the affairs of such bank.

We have searched the reported cases carefully, and all of the cases which we have found, with the one exception hereafter noted, held by the court to be suits for winding up the affairs of a national bank, have been suits where either the Receiver of a national bank, or a statutory agent of the stockholders for liquidation, were parties complainant or defendant.

There are many of these cases, but we can see no good purpose to be served by burdening the court with citation to them.

We submit that the rule is correctly stated by District Judge Holmes (now Circuit Judge Fifth Circuit Court of Appeals) in his opinion in *Neely v. Planters National Bank* (D. C. Miss.—1931) 48 Fed. (2d) 266, where he says:

> "An action brought against the receiver of a national bank, or against the bank and the receiver jointly, is a case for the winding up of the affairs of a National Banking Association, and is removable. *International Trust Co. v. Weeks,* 203 U. S. 364, 27 S. Ct. 69, 51 L. Ed. 224; *Studebaker Corporation v. First National Bank* (D. C.) 10 F. (2d) 590; *Larabee Flour Mills v. First National Bank* (C. C. A.) 13 F. (2d) 330; *Moulton v. National Farmers Bank* (D. C.) 27 F. (2d) 403; Id. (C. C. A.) 31 F, (2d) 1018; *Guarantee Co. v. Hanway* (C. C. A.) 104 F. 369.
>
> "But, as has been shown, this suit was brought against the bank alone before the receiver was appointed, and was pending at the time of his appointment. The latter may properly be made or become a party, but his presence is not indispensable to a continuation of the suit. While he may be admitted as a defendant, on his own application, to defend in behalf of his trust, such admission does not give him the right to remove to the federal court. *Denton v. Baker* (C. C. A.) 79 F. 189; *Speckert et al v. German National Bank* (C. C. A.) 98 F. 151.
>
> "Since a National Bank does not lose its corporate existence upon the appointment of a receiver, a creditor of such bank has the right to sue it in the state court without joining the receiver, and such action is not removable. *Moulton v. National Farmers' Bank* (D. C.) 27 F. (2d) 403; *Bank of Bethel v. Pahquioque Bank,* 14 Wall. 383, 20 L. Ed. 840; *Earle v. Pennsylvania,* 178 U. S. 449, 20 S. Ct. 915, 44 L. Ed. 1146.

"The appointment of the receiver after the filing of the suit against the bank, and the subsequent assumption of custody by him of all of its assets, with statutory duties to perform in reference thereto, did not confer jurisdiction on this court and make the cause removable, since the suit as filed by the plaintiffs was not a controversy between citizens of different states or a case for winding up the affairs of a national bank, and no other federal jurisdictional ground appears."

Also, see *Barons v. First National Bank*, 28 Fed. (2d) 615. And in the case of *Moulton v. National Farmers Bank* (D. C. Minn.) 27 Fed. (2d), 403, one of the authorities cited by Judge Holmes in the Neely case, it is said:

"A creditor of an insolvent national bank has the right, under existing statutes, to bring an action against the bank itself in a state court without joining the receiver, and that, while the suit is one to establish the existence and validity of a claim against the bank, it is not, in the absence of the receiver as a named defendant, a case of winding up the affairs of the bank, which it or the receiver can remove to the federal court."

Appeals taken in this case were dismissed by the Eighth Circuit of Appeals in *National Farmers Bank v. Moulton*, 31 Fed. (2) 1018, and in *National Farmers Bank v. Moulton*, 32 Fed. (2d) 78.

The only exception mentioned above which we have found where any court has held a suit one for the winding up the affairs of a national bank where neither a receiver nor a statutory agent is a party is the case of *Citizens National Bank v. Bank* (D. C. Tex. 1935) 9 Fed. Sup. 513.

That case, as we understand, involved a contract between an insolvent bank and a new or reorganized bank for the transfer of certain assets to the new bank, and the liquidation of the old

bank, with provisions for certain contingencies. The court held that the transaction was not a completed sale and therefore the suit involving the contract was one for winding up the affairs of the old bank. We are advised by counsel in that case that no appeal was prosecuted for the reason that a compromise was effected.

It is apparent, however, that that case, under the facts found by the court, could be no authority here for there can be no doubt that the transfer here involved between the receiver of the old bank and the defendant *was* a completed sale.

We most respectfully submit that the case at bar is not a case for winding up the affairs of a national bank.

CONCLUSION

There are many other cases which we could have, and perhaps should have, cited on the points set forth in the foregoing brief, but we feel that we have, perhaps, already burdened the brief with too many citations.

We are firmly convinced that the question presented is definitely settled in favor of the petitioner's position by the case of *Puerto Rico v. Russell & Company*, 288 U. S., 476, 77 L. Ed. 903, supra.

We most respectfully submit that this cause is not one of which the District Court had jurisdiction because the same was improperly removed from the state court, in that the questions involved, and upon which the suit is predicated, are whether or not the assessments involved are valid under the laws of the State of Mississippi, and whether or not the contracts create liability therefor under the allegations of the original bill.

We most respectfully submit that this suit is not one arising under the laws of the United States, and is not a suit for the winding up of the affairs of a national bank; therefore, we most

respectfully submit that an order should be entered by this court reversing the order of the Circuit Court of Appeals herein remanding the cause to such court, with directions to remand the cause to the District Court of the United States for the Eastern Division of the Southern District of Mississippi, to be remanded to the Chancery Court of Lauderdale County, Mississippi, where the same originated.

Respectfully submitted,

J. C. FLOYD,

Of Counsel for Petitioner.

CERTIFICATE OF COUNSEL

I, J. C. Floyd, of counsel for the petitioner, complainant in the court below, do hereby certify that I have this day delivered in person to the Hon. R. E. Wilbourn and the Hon. A. S. Bozeman, of counsel for the respondent, defendant in the court below, a true and correct copy of this brief.

This the 24th day of September, 1936.

J. C. FLOYD,

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Supreme Court of the United States

OCTOBER TERM, 1935

No. [redacted] 29

JAMES B. GULLY, STATE TAX COLLECTOR, FOR THE STATE OF MISSISSIPPI, Petitioner

v.

FIRST NATIONAL BANK IN MERIDIAN,

Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

October Term, 1935

JAMES B. GULLY, STATE TAX COLLECTOR FOR THE STATE OF MISSISSIPPI,

Petitioner

vs

FIRST NATIONAL BANK IN MERIDIAN,

Respondent

No. 911

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

ADDITIONAL STATEMENT

In our view it is necessary to make some additional statement of the case for purposes of correcting, clarifying and amplifying that made by Counsel for Petitioner.

The suit in this case was begun in the Chancery Court of Lauderdale County, State of Mississippi, by the filing of a bill of complaint on the 1st of August, 1933, against First National Bank *in* Meridian, respondent, alone, (Transcript, page 1), seeking to recover of the respondent certain taxes claimed to be due the State of Mississippi, the County of Lauderdale, the City of Meridian and Meridian Separate School District, for the year 1930, on the capital stock, surplus and

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NOTE—All *Italics* our unless otherwise noted."

undivided profits of First National Bank *of* Meridian, hereinafter, for brevity and convenience referred to as the "old bank", which institution became insolvent and closed its doors permanently on the 13th of January, 1931. A receiver was appointed, by the Comptroller of the Currency, of the old bank shortly after the 13th of January, 1931. The receiver took charge of all the assets of the insolvent bank and proceeded with the liquidation thereof.

At the time the receiver took charge of the assets of the old bank upon his appointment by the Comptroller of the Currency, the alleged taxes which the petitioner is seeking to recover in this suit against the respondent, the new bank, were assessed directly to the old bank instead of to the shareholders thereof in direct violation, as we think will clearly appear on a consideration of the facts and the authorities which we shall cite, both of the laws of the State of Mississippi and of the United States of America.

Neither the old bank, nor its receiver, nor any of the shareholders, were made parties defendant to the original bill, nor were the local assessor and the tax collector joined in the suit.

The effort of the petitioner by the original suit was to recover the alleged taxes from the new bank, the respondent, claiming same were provided for in a certain contract entered into by it with the receiver of the old bank, by and with the approval in writing of the Comptroller of the Currency of the United States, and pursuant to an order of the District Court of the United States for the Eastern Division of the Southern District of Mississippi, which contract was exhibited with the original bill as Exhibit "F", and, also, in certain contracts between the new bank and the shareholders of the old bank, Exhibits "H" and "I" to the original bill of complaint.

As to the contract, Exhibit "F", without attempting here any extended analysis of it, it would seem sufficient to say that the claim for the alleged taxes here involved is no where mentioned therein, nor expressly assumed thereby, and a consideration of it (Transcript 36), and the opinion of the Circuit Court of Appeals, will show that the petitioner is in error in stating that respondent, the new bank, agreed, in the purchase of assets of the old bank, to "assume and pay in full with interest the claims of all other creditors against said suspended bank, whether said claims be known or unknown which may be duly established according to law."

On the contrary, the actual obligation assumed by the new bank, in the contract for the purchase of the assets of the old bank, was to surrender to the receiver numerous claims held by it against the old bank, under a creditors' agreement signed by over 90% of the holders of all such claims, and, in addition thereto, to pay the receiver $397,888.78, "representing the amount necessary to pay all receivership expenses accrued and to accrue, and to enable the receiver to pay in full, with interest to the date of payment, the claims of all known creditors who have not executed the aforesaid creditors' agreement * * * and the said purchaser will pay the receiver such further sums from time to time during the period of active receivership as the receiver may deem necessary to meet receivership expenses and to provide for the payment of such unlisted or unknown claims as may be established during the period of active receivership."

See: Transcript 39.

It was, therefore, clearly necessary for the petitioner to show that the claimed taxes were levied according to the laws of the United States, were valid and such taxes as,

under the laws of the United States, could be asserted against the receiver of an insolvent national bank in the course of liquidation, and which the receiver could have properly paid out of the assets of the old bank.

As rightly held by the Circuit Court of Appeals for the Fifth Circuit, the laws of the United States were a necessary ingredient in the petitioner's case so that the removal of the case to the District Court of the United States was proper; and the motion to remand to the State Court was properly overruled.

THE STATE LAW

Counsel are in error in supposing that the law required the old bank, as the agent of its stockholders, to make a return.

The State Law, Section 3138, Code 1930 of Mississippi, with reference to the assessment of banks, reads as follows:

> "The president, cashier, or other officer having like duties, of each bank or banking association in this state, existing by the laws of this state, shall deliver on or before the first day of April each year to the assessor of taxes of the county in which it is located, a statement on the form prescribed, by the state tax commission, under oath, of the number and amount of all the shares of its capital stock paid in, or if it be not a corporation or joint stock company, then the amount of its capital, and of the sum of all undivided profits or surplus or accummulation of any sort constituting part of the assets of the bank, excluding its real estate; and the value of such shares estimated at par and increased by the proportion of the par value of all the shares of stock to the said surplus fund or accummulation, or of the amount of its capital so increased, shall be the basis of the taxation of such shares to the bank or of the capital to the owner thereof in case the bank be not a corporation or joint stock company, and the taxes levied on such bank or banking association shall be a first lien on its assets, but if the shares of such bank or banking association are of less value than par, they shall be valued accordingly. Provided, nevertheless, in case of such bank or banking association existing under the laws of the United States, a precisely similar amount shall be

assessed upon and collected from the shareholders thereof at the domicile of the bank as would have been assessed upon and collected from the said bank had it been created under the laws of the State of Mississippi; but each said bank and banking association shall, nevertheless, be liable to pay any taxes as the agent of each of its shareholders, and may pay the same out of their individual profit account, or charge the same to their expense account, or to the account of such shareholder in proportion to their ownership."

THE RETURNS AND ASSESSMENTS

The return made by the old bank to the assessor of Lauderdale County, State of Mississippi, which it is claimed was copied on to the assessment roll, is shown by the 8th paragraph of the bill—, Transcript 3— to have been in the following words:

"NAME—BANK, FIRST

Bank's Capital Stock, Surplus and Undivided Profits, less book value of real estate $540,135.00

Total Value of all Personal Property..$540,135.00"

The 21st paragraph of the bill, — Transcript 8— shows the return which it is claimed was copied precisely on the assessment roll, reads as follows:

"FIRST NATIONAL BANK:

2600 Shares Capital Stock	$260,000.00
Surplus and Undivided Profits	$313,890.00
	$573,890.00
Less Real Estate	$ 33,700.00
	$540,190.00
Total Value of all Personal Property	$540,190.00
Total Tax on Same	$ 13,504.75"

There was nothing in the return, in either instance, indicating that the assessment should be made against the old bank itself. Such reference in the return to the name of the bank was clearly purely to indicate who made the return.

The laws of the United States only authorized the shares to be assessed to the shareholders. The state law specifically required this to be done.

Both assessments are in effect assessments of a total value of personal property directly to the bank and neither of them is the equivalent of the assessment of the shares to the shareholders. *Owensboro National Bank vs. Owensboro* (1899), 173 U. S. 664, 43 L. Ed. 850, 19 S. Ct. 537.

The applicable state statute is Section 3138 of Code of 1930 of Mississippi, quoted supra herein. That section did not require the return made by the bank to give a list of the shareholders, nor their addresses, nor the amount of stock each owned, nor to state to whom the assessment should be made; but did provide expressly that in the case of a national bank the value of the shares as measured by the statute "shall be assessed upon and collected from the shareholders." The averments of the orginal bill,

in effect, charged that the old bank strictly complied with said section 3138.

See: Transcript page 3—8th paragraph of original bill.
Transcript page 8—21st paragraph of original bill.

PETITIONER EXPRESSLY INVOKED UNITED STATES LAW AFTER MOTION TO REMAND OVERRULED.

After motion to remand to the State Court was overruled, petitioner sought to make amendments of the foregoing 8th and 21st paragraphs of the original bill.

See: Transcript 101-102.

These amendments, however, did not materially change the effect of the original bill. Such proposed amendments did, however, expressly aver that the old bank undertook to make the alleged returns for assessment of taxes "as required by the laws of the State of Mississippi and of the United States."

PETITIONER'S CLAIM IN BILL

The charge of the bill, with reference to all alleged taxes sued for is "that the same were due by the shareholders of the First National Bank *of* Meridian."

It is not claimed that the old First National Bank *of* Meridian owed any of the taxes primarily. Though asserting a state of facts which clearly shows that the alleged taxes were assessed as against the old bank, contrary to the express provisions of both the state and federal law, and, although same were never assessed as against the shareholders of the old bank, it was claimed, as a mere legal conclusion, that the old bank was liable to pay the debt of its shareholders.

It is manifest, both under the laws of the United States and the State of Mississippi, that there could be no liability upon the old bank as the agent of its shareholders to pay any tax for the shareholders except such as might have been legally assessed to the shareholders against their stock, and then only in the event that at the time of the payment the bank had property of the shareholders out of which it could reimburse itself the tax paid. But while, though charging in general terms that the tax was due to have been paid before December 1, 1930, and that during the period from January 1, 1930 to January 13, 1931, the day the old bank closed its doors, it had in its possession and under its control "divers large sums of money belonging to its said shareholders, said money being both dividends declared upon the said shares (not, however, alleged to have been paid), as well as money on deposit in said bank to the separate accounts of such shareholders (not, however, alleged to have been withdrawn), and stating that the exact amount of such dividends and deposits was unknown to petitioner, but believed to have been in excess of each share-

holder's pro rata of said taxes, there was no effort to show what became of such funds, nor that the old bank did anything therewith, nor that one penny thereof passed into the hands of the receiver. The petitioner merely alleged that the old bank did not pay the taxes on or before December 1, 1930 out of any funds of its shareholders "then and therefore in its possession"— (Transcript 7 and 11); and "that on the 13th day of January, 1931, the said First National Bank of Meridian became insolvent, suspended business, and was thereafter liquidated by a receiver appointed by the Comptroller of the Currency"—(Transcript 12, paragraph 33 of the bill of complaint).

The new bank, respondent here, was not organized until June 1931. It came into existence pursuant to a plan set forth in a creditors' agreement, which is Exhibit 1 to the contract between the respondent and the receiver of the old bank, and which is found: Transcript 44 to 50.

CREDITORS' AGREEMENT EXHIBIT 1 TO EXHIBIT *"F"*

Without attempting any long analysis of the said creditors' agreement, exhibit 1 to the contract between the receiver of the old bank and the respondent, it may be briefly stated that while the contract between the receiver and the respondent purported to be a transfer from the receiver to the respondent of all the assets of the old bank, such transfer was pursuant and subject to the terms of such creditors' agreement (Transcript 44 etc.), by virtue of which the respondent agreed only to assume and pay 75 per cent of the claims of the creditors who signed the creditors' agreement aforesaid—paying 10 per cent thereof cash, 15 per cent in 12 months after the opening of the respondent bank, 25 per cent 24 months thereafter, and 25 per cent 36 months thereafter,

for which, under the contract with the receiver, it retained certain specific assets intended to represent as nearly as possible the equivalent of the obligation assumed by the respondent bank to such creditors as signed the creditors' agreement, the remaining assets of approximately the face value of $1,254,766.09 to be liquidated, for the benefit of the creditors signing the creditors' agreement, by Trustees appointed and controlled by respondent bank.

The respondent bank had the right for two years to substitute assets retained by it for trusted assets, as set forth in the creditors' agreement (Transcript 44 et seq).

On completion of the liquidation of the trusteed assets by the trustees under the direction and control of the respondent bank, any amount remaining after final satisfaction of the claims of creditors signing the creditors' agreement, is required to be distributed ratably to the stockholders of the old bank.

CONTRACTS EXHIBITS "H" AND "I"

The contracts, Exhibits "H" and "I" to the bill of complaint—(Transcript 50 and 51)—were not purchases by the new bank of the shares of stock of the old bank. On the contrary, because the contract between the receiver and the respondent bank, together with the liquidation of the trusteed assets, pursuant to the creditors' agreement, Exhibit 1 to such contract, would, in effect, actually relieve the shareholders of the old bank of their statutory liability to assessment as such shareholders; and, because, if there were left anything out of the liquidation of the trusteed assets under the direction of the respondent bank, same was to be ratably distributed to the shareholders of the old bank, the transfers, Exhibits

"H" and "I" (Transcript 50 and 51) were made, with the understanding that the respondent bank, at the conclusion of the liquidation of the trusteed aessets, would turn over to the shareholders of the old bank their prorata shares of what remained from such liquidation.

Since the bill charges that all shareholders signed the transfers, Exhibits "H" and "I" (Transcript 50 to 51) it appears that the shareholders of the old bank made the respondent bank their statutory agent, to receive for and disburse to them anything that might remain from the liquidation of the trusteed assets.

But, as said by the Circuit Court of Appeals, the contracts Exhibits "H" and "I" were, at most, merely an agreement to hold harmless the shareholders of the old bank and not such a contract as would justify any suit by the petitioner thereon.

Furthermore, the Circuit Court of Appeals held that even the agreement to hold harmless, related only to the liability of the shareholders of the old bank to be assessed by the Comptroller.

The contract between the respondent bank and the receiver was not a sale of any liability to assessment by the Comptroller. Indeed the receiver could not make sale of any such liability under the law.

ARGUMENT

The opinion of the Circuit Court of Appeals, to the effect that the suit is one arising under the laws of the United States, is clearly correct and not in conflict with any decision of either the Circuit Court of Appeals nor of the Supreme Court of the United States.

The precise question was most admirably and fully discussed by United States District Judge, Hon. Edwin R. Holmes, now a Judge of the Circuit Court of Appeals of the Fifth Circuit, in a Mississippi case—*City of Hattiesburg v. First National Bank*, 8th Fed. Supp. 157, especially at page 168, from which we quote as follows:

> "The remaining question is whether this is a suit 'arising under the Constitution and laws of the United States.' That depends upon whether the city necessarily relies upon section 5219 of the Revised Statutes of the United States with amendments thereto (12 USCA Sec. 548, as well as upon section 3138, Mississippi Code of 1930, for authority to make the assessment. If so, there is a federal question which arises on the plaintiff's statement of its case; but, if the city may properly state its case without invoking the authority of said federal statute or may properly allege facts from which its right to make the assessment may be inferred as a matter of law, without reference to said federal statute, then there is no federal question which necessarily appears from the plaintiff's own pleading. In other words, there is no dispute that there is a federal question in this case, but the contention of the city is that such a question arises only as a matter of defense or as anticipatory of a defense.

"In *Owensboro National Bank v. Owensboro* (1899), 173 U. S. 664, 19 S. Ct. 537, 43 L. ed. 850, upon writ of error to the Court of Appeals of the State of Kentucky, it was held that a state is wholly without power to levy any tax, direct or indirect, upon national banks, their property, assets, or franchises except when permitted to do so by legislation of Congress; that section 5219 of the Revised Statutes was the measure of the power of states to tax national banks; and that the tax, having been assessed on the franchise or intangible property of the corporation, was not within the purview of the authority conferred by the Act of Congress, and was, therefore, illegal. In its opinion, the Court speaks of said section 5219 as a grant of power to the states, and says that any tax not in conformity to it is void. In undertaking to determine the validity of the Kentucky statutes, which sought to tax the franchises of national banks, the Court analyzed the questions presented thus:

"'Were the taxes complained of levied upon the bank, its property, or franchise, and, if so, were they legal? is the question which, then, arises on the threshold of the case.

"'Two elements are involved in the determination of this question; that is, the extent of the power of the respective states to tax national banks, and the ascertainment of the scope and purport of the law by which the taxes complained of were levied.

"'Early in the history of this government, in cases affecting the Bank of the United States, it was held that an agency, such as that bank was adjudged to be, created for carrying into effect national powers granted by the constitution, was not, in its capital, franchises, and opera-

tions, subject to the taxing powers of a state.' *McCulloch v. Maryland*, 4 Wheat. 316 (4 Law Ed. 579); *Osborn v. Bank of the United States*, 9 Wheat. 738, (6 Law Ed. 204).

"The court stated that the first act providing for the organization of national banks contained no 'grant' of power to the states to tax national banks in any form whatever, but the following year the power was 'granted' to tax the shares of stock in the name of the stockholders.

"It follows that in a proper proceeding to tax the shares or surplus of a national bank a state must rely, first, upon the act of Congress which is the measure of its power, and, second, upon its own legislation which has been enacted in conformity thereto. In this case, it must be concluded from the assessment roll, which is the plaintiff's pleading, that it is attempting to tax the bank in reliance upon the federal statute conferring the right in measured terms so to do. As stated by Chief Justice Taft, in the *Arkansas Road District case*, 257 U. S. 547, 42 S. Ct. 250, 66 L. Ed. 364, the city of Hattiesburg is plaintiff, 'asking the Court to give (it) a judgment confirming the assessments.' The book of assessment and the objections of the taxpayer 'make the pleadings.' The proceedings are in Invitum; the bank is the defendant. From the assessment roll it appears inescapably that the assessment is against a national bank, and from that fact the court takes judicial knowledge that it is a fiscal agency of the United States Government which the city is without power to tax except by special grant, and, therefore, concludes as a matter of law that the city is relying upon the federal statute to sustain its right to make the assessment,

"In matters of removal, the federal courts are not bound by the rules of pleading under state procedure in ascertaining what constitutes a case involving a federal question. Even the abolition of written pleadings and a return to pleadings ore tenus, as at ancient common law, could not take away the right of removal to a federal court under the Constitution and laws of the United States. Regardless of state practice or procedure, the question, which the federal courts must determine for themselves, is whether the plaintiff asserts a right, the correct decision of which, without anticipating defenses, depends wholly or in part upon the application or construction of the Constitution or laws of the United States. Mere references or absence of reference to a federal statute are not conclusive; but it is sufficient, if from the facts alleged it clearly appears, or reasonably follows as a conclusion of law, that a federal law is necessarily relied upon in good faith by the plaintiff as an essential or integral part of his case."

See, also, *Osburn v. The Bank of the United States,* 9 Wheat. 738, 6 L. Ed. 204.

This case is, as said by Chief Justice Marshall, prevaded, from its origin to its close, by United States Law and United States authority.

Young & Jones v. Hiawatha Gin & Mfg. Co., 17 Fed. (2nd) 193, another opinion by District Judge E. R. Holmes.

Auburn Savings Bank v. Hayes, 61 Fed. 911;

Boch v. Perkins, 129 U. S. 628, 29 L. Ed. 314;

National Rockland Bank of Boston v. City of Boston, 296 Fed. 683;

Great Northern Ry. Co. v. Galbreath Cattle Co., 271 U. S. 99, 70 L. Ed. 854;

A. G. S. R. R. Co. v. American Cotton Oil Co., 229 Fed. 11 (Fifth Circuit).

A controversy may be truly said to arise under the laws of the United States in all cases where a law of the United States grants a right of property or of action, and a suit is brought to enforce that right, and also wherever it affirmatively appears from plaintiff's pleadings that the correct decision of the case depends on the construction of a law of the United States or that some right, title, privilege or immunity on which the recovery depends will be defeated or sustained by the construction of the law.

See: *Cohens v. Virginia*, Wheat. 264, 5 L. Ed. 257;

Osborn v. United States Bank, 9 Wheat. 738, 6 L. Ed. 204;

Little York Gold Washing & Water Co. v. Keyes, 96 U. S. 100, 24 L. Ed. 656;

Starin v. New York, 115 U. S. 248, 6 S. Ct. 28, 29 L. Ed. 388;

Patton v. Brady, 184 U. S. 608, 22 S. Ct. 493, 46 L. Ed. 713;

Germania Ins Co. v. Wisconsin, 119 U. S. 473, 7 S. Ct. 260, 30 L. Ed. 461;

Ray v. Poulnot (D. C.), 46 Fed. (2d) 677;

Southern Ry. Co. v. Prescott, 240 U. S. 632, 36 S. Ct. 469, 60 L. Ed. 836;

Bellaire, Benwood & Wheeling Ferry Co. v. Interstate Bridge Co., (C. C. A. 4th), 40 Fed. (2d) 323, 326,

The right to tax asserted, and the assessment sought to be enforced as stated, arises, if at all,, under, and must be tested by, the laws of the United States. The validity vel non of what was done, and here relied upon by respondent, turns on the laws of the United States.

In *Richards v. Incorporated Town of Rock Rapids* (Iowa), 33 N. W. 372, the President of a National Bank appeared before the equalization board on behalf of its stockholders and objected to the assessment as being in excess of that placed upon other moneyed capital. The board refused to equalize the amount as demanded. Appeal was taken to the Circuit Court, and there the defendant asked to remove the case to the Federal Court. The petition to remove was in proper form, but was overruled. Judgment was rendered against it, and on appeal to the Supreme Court of Iowa, the Court said:

> "It is not denied that the question involved in the case requires the application of the rule of taxation prescribed by Section 5219 of the Revised Statutes of the United States. The controversy, therefore, involved a Federal question. The fact that the laws of the state prescribed the same general rule does not defeat the jurisdiction of the Federal Courts. If this position be correct, a state might, by re-enacting any Federal Statute, take away the jurisdiction of the Federal Courts. The case is clearly removable under the Act of Congress, approved March 3, 1875, the provisions of which we need not here repeat. The parties were before the Court; a controversy existed between them in a proceeding involving a question under the Federal Statute; and we think the order of removal should have been made."

In *Stanley v. Board of Supervisors,* 6 Fed. 561 (Circuit Court) the Court says:

> "****this is a suit arising 'under the laws of the United States' within the meaning of the Act of Congress of March 3, 1875, respecting the jurisdiction of Circuit Courts. The action is to enforce a right conferred upon the plaintiff and his assignors by section 5219, of the Revised Statutes of the United States, regarding the taxation of property in the shares of national banking associations." (The nature of the suit is not further disclosed). "As was said by Chief Justice Marshall, 'A case may be truly said to arise under the constitution, or a law of the United States, whenever its correct decision depends upon a construction of either,' (*Cohen v. Virginia,* 6 Wheat. 379); or where the title or right set up by the party may be defeated by one construction of the constitution or the laws of the United States, or sustained by the opposite construction. *Osborn v. Bank of U. S.,* 9 Wheat. 822. The right of the plaintiff depends upon the construction of section 5219. If that section is meant to interdict such an asessment as that of which the plaintiff complains, his right is sustained by a construction to such effect, and will be defeated by the opposite construction."

CASES RELIED UPON BY PETITIONER DIFFERENTIATED

The case of *Puerto Rico v. Russell & Co.*, 228 U. S. 476, 77 L. Ed. 903, is inapplicable, and not in conflict with the decision of the Circuit Court of Appeals. This case is reported, in the lower court, in 60 Fed. (2d) 10. In that case the removal was upheld on the theory of diversity of citizenship, as to which the Supreme Court disagreed with the lower Court.

The case of *Puerto Rico v. Russell & Co.*, supra, did not involve the taxation of shares of stock in a national bank.

The fact that the People of Puerto Rico is a political entity, recognized as such by an Act of Congress under which its government is organized, was not deemed sufficient to make a suit brought by it to recover an improvement tax, such as that involved in the case of *Puerto Rico v. Russell & Company*, supra, one arising under the laws of the United States any more than a like suit brought by a State which came into the Union by virtue of an Act of Congress.

Here, the right to tax at all is specifically created by an Act of Congress.

As aptly said by Judge Sibley, in the opinion in this case: "Section 548 is not a limitation placed by the Federal laws upon an antecedent right of the state to tax national banks, so as to be considered only a weapon of defense against such taxation. Both in form and in substance it is a grant of authority to state legislatures to tax such banks, limiting them, however, to one of three forms of taxation" mentioned in the statute.

This case does not involve merely a right to sue, derived from Federal law, as in the case of *Puerto Rico v. Russell* & Co., supra, nor merely the right to property which was obtained under Federal Statute.

In the instant case, the foundation of the right to tax national bank stock at all, to any one, in any manner, and the right to collect a tax of a receiver of an insolvent national bank and the assets in his hands, is necessarily grounded upon the Acts of Congress, and the controlling question is the interpretation and enforcement of the Federal Statutes in that regard. Such appears upon the face of the petitioner's pleadings.

Nor is there any conflict between the decision of the Circuit Court of Appeals of the Fifth Circuit in the instant case and the opinion of the Supreme Court of the United States in *Shulthis v. McDougal*, 225 U. S. 561, 56 L. Ed. 1205.

In *Shulthis v. McDougal* no question as to the validity of, and enforceability of, a tax against a national bank as against the assets of an insolvent national bank in the hands of a receiver as here, was involved. In *Shulthis v. McDougal* there was merely a controversy over rights and titles in and to lands originally alloted to the Creek Nation under Acts of Congress. In other words, under various statutes of the United States, certain lands had been alloted in severalty to the Creek Nation and provision had been made as to their leasing and alienation after allotment. True, as pointed out by the Court, there was enough in the bill of complaint to indicate that those statutes constituted the source of the complainant's title or right originally to the land involved, and that the defendants were claming the land, or certain rights

thereunder adversely to the complainant. But under the allegations of the bill, it did not appear as here, that the complainant necessarily relied upon the laws of the United States. Not only was there no mention made of certain statutes relating to the allotments to the Creek Nation and the laws as to the alienation of such lands, but there was nothing to show that any controversy respecting their validity, construction or effect was involved and as pointed out by the Court, such did not appear "by necessary implication." The Supreme Court of the United States, also pointed out that the nature of the controversy between the complainant and his opponent was unstated and uncertain and could have arise in different ways "wholly independent from the source from which his title or right was derived." In addition thereto, the Court expressly held that the corporation there being sued was not a Federal, but a state corporation.

There is nothing in the case at bar in conflict with the decision in *Shulthis v. McDougal.*

Here, it clearly appears upon the face of the petitioner's own pleadings that in order to hold respondent under its contract with the receiver of the old bank, it was necessary for petitioner to show that the tax claimed was laid in conformity to, and valid under, the laws of the United States and that the claimed liability of the old bank therefor was one that was enforceable against the receiver of the old bank and the assets in its hands after insolvency. The determination of such questions necessarily involved the construction, effect and applicability of the laws of the United States as applied to the facts. Indeed, the case could not be decided by any court without construing and applying the Federal statutes.

PETITIONER ESTOPPED BY AMENDMENT AFTER MOTION TO REMAND OVERRULED

Petitioner is estopped to contend that he did not rely upon the laws of the United States for the reason that after the District Court of the United States had overruled the motion to remand and had heard the motion to dismiss and announced orally his conclusion that the motion to dismiss the bill should be sustained, petitioner presented a motion for leave to amend the seventh, eighth, twenty-first and forty-third paragraphs of the original bill so as to aver that the liability of the shareholders of the old bank to taxation in the instant case was pursuant to the laws of the State of Mississippi "and the laws of the United States," and that the old bank was required to make the returns that it is alleged it did make by the "laws of the State of Mississippi and of the United States." (Transcript, P. 100).

The motion to amend contains other matter, but at this point, we direct particular attention to that feature of it which expressly invokes the laws of the United States to establish the validity of the assessment and tax. Numerous objections to the allowance of this amendment were filed by the respondent, the new bank, which will be found, beginning at the bottom of page 105 of the Transcript. We refer at this point, however, to only one of those grounds of objections to the allowance of the amendment, which will be found, Transcript, page 109, and reads as follows:

> "7. It would be futile to grant the plaintiff's motion to allow the proposed amendments to the bill of complaint, because of the fact that if the said amendments to the bill be made, still the bill as amended would state no cause of action against this defendant, and

would still be subject to the same objections as were made to the original bill in this defendant's motion to dismiss the same."

It will be noted from the final decree in the lower court, Transcript, page 111, that the District Court was of the opinion that the quoted ground of objection to the amendment was good, and in passing thereon, ordered the proposed amendment and the objections thereto made a part of the record and found and declared with reference thereto as follows:

> "****that the proposed amendments, if allowed, neither change in any material way the legal effect of the original bill, nor cure the defects therein; that considering the bill as amended by the proposed amendments, the Court is of the opinion, that the assessments relied on are not the equivalent of a tax on the shareholders, are wholly void, contrary to the laws of the United States and of the State of Mississippi, beyond the power of such taxing authorities and unenforceable."

It appears, therefore, that the Court in passing on the motion to dismiss, treated the bill as amended by the proposed amendments and held the alleged tax here sued for, to be based upon an assessment that was wholly void and contary to the laws of the United States and of the State of Mississippi..

See the case of *Henderson v. Maryland Casualty Company*, (Fifth Circuit), 62 Fed. (2d) 107. In that case the plaintiff being entitled to a weekly wage of $16.95 which in the aggregate for the total weeks used for, amounted to $3661.20, averred in his petition, wishing to avoid removal to the Federal court, a weekly wage of only $13.50, and on the

face of his pleading sought to recover only $2916.00. The defendant on the petition averring the true wage and that more than $3000,00 was involved, removed the case to the District Court of the United States. The plaintiff there asked that it be remanded to the state court. But when the motion to remand was overruled, plaintiff then amended in the District Court and sought recovery for the true wage and a total of $3661.20. Speaking to the point, Judge Sibley for the Court, said:

> "This amendment we think waived and cured any error that may have been made in refusing the remand. The controversy really was one within the jurisdiction of the District Court, and the pleadings thereafter showed it. The plaintiffs thenceforward were invoking the court's jurisdiction to recover $3,661.20. While asserting this claim, they could no longer maintain the inconsistent position that only $2,916 was involved. They are estopped to do so. Compare *New Lamp Chimney Co. v. Brass & Copper Co.*, 91 U. S. at page 659, 23 L. Ed. 336; Davis v. Wakelee, 156 U. S. 681, 15 S. Ct. 555 39 L. Ed. 578."

We contend that the bill as originally drawn from the facts therein averred affirmatively and clearly showed reliance upon the laws of the United States; and that not only is this true, but that by the proposed amendment which the District Court treated as having been made, in sustaining the motion to dismiss, the petitioner admitted and conceded of record that he was relying upon the laws of the United States.

OTHER LAWS OF UNITED STATES RELIED ON BY PETITIONER

It is further apparent from the pleadings of the petitioner that affirmative reliance was necessarily based not only on Section 5219 of the Revised Statutes, 12 U. S. C. A., Section 548, to establish the validity of the claimed tax, but upon the laws of the United States with reference to the winding up of insolvent banks and distribution of the assets of an insolvent bank pursuant to the authority and consent of the Comptroller of the Currency and under the laws of the United States. See, 12 U. S. C. A., Sections 191, 192, 193, 196, 197 and 198. This is true because the bill avers the insolvency of the old bank, the appointment of the receiver, the contract between the receiver and the new bank, Exhibit "F" to the bill of complaint, which for the purpose of this point is sufficiently hereinabove analyzed, and seeks to establish the existence of a tax claim to maintain which, he necessarily relied upon laws of the United States to establish that such claim was one legally payable out of the assets of the insolvent bank in the hands of the receiver and by the receiver and that, therefore, such claim was one provided for in the contract, Exhibit "F" between the receiver and the new bank, the respondent.

Though the Circuit Court of Appeals stated in the opinion that it did not conceive that the suit was one for the winding up of, and the liquidation of, the affairs of an insolvent national bank, this was said after the Court had reached the conclusion that jurisdiction was amply sustained on the ground that the suit was one arising under the laws of the United States. We respectfully submit that the jurisdiction of the District Court of the United States was rightly upheld by the Court of Appeals on the ground that the suit was one

necessarily arising under the laws of the United States; but, further that if it were necessary to do so, jurisdiction can be upheld on the ground that the suit is one, the manifest purpose of which on the face of the petitioner's own pleadings, is further winding up of, and liquidation of, the affairs of an insolvent national bank within the meaning of Paragraph 16 of section 41 of the Judicial Code. It is perfectly apparent that the contract, Exhibit "F", was one for the liquidation over a period of years and in an orderly way, so as to save the tremendous loss incident to the immediate conversion of the assets of the old bank into cash and distribution to the creditors and depositors thereof.

It, also, appears that the contract when properly understood, did not operate to pass all the assets of the old bank to the new bank immediately upon its execution, nor did the duties and obligations of the old bank cease upon the mere transfer. That contract manifestly was intended to insure to the creditors who signed the creditors' agreement, the payment to them of 75 per cent of their claims by the new bank in the manner outlined by the contract and over the period of yeans specified therein, and the making of provision for the remaining 25 per cent due the cerditors signing such agreements out of the trusteed assets and the reservation of the right in the receiver during the active period of the receivership, in addition to the large amount he reserved out of the assets of the old bank to pay those creditors who did not sign the agreements, to call upon the new bank to put him in funds with which to pay unknown claims established during the period of the active receivership.

As a part of its contract with the receiver, made with the approval of the Comptroller of the Currency, the new bank, which was authorized by the Comptroller to begin business

during the period of the liquidation of the old bank, was obligated to supervise the liquidation of the trusteed assets, and the contract, Exhibit "F" and the creditors' agreement, Exhibit 1 thereto manifest the intent of the contract on the part of the receiver and the Comptroller of the Currency to assure the ability of the new bank to perform its agreement as to the 75 per cent which it agreed to pay to the creditors who signed the agreement, Exhibit 1, and its ability to carry out its obligations under the contract to supervise and require the completion of the liquidation of the trusteed assets, and its ability to be in position during the period of the active receivership to respond to the demands of the receiver for funds with which to pay any unknown claims established during the period of the active receivership.

The bill shows that the shareholders acquiesced in the contract, Exhibit "F", by transferring, on the terms of the contracts, Exhibits "H" and "I", their stock to the new bank, not upon the theory that the new bank would assume and pay the shareholders' statutory liability, but that the accomplishment of the plan of liquidation manifested by the contract, Exhibit "F" and Exhibit "1" thereto, would have the logical effect when worked out, of leaving no statutory liability to be assessed upon the shareholders by the Comptroller of the Currency and would thereby relieve the said shareholders of such statutory liability. There was no agreement of the new bank to assume the shareholders' statutory liability for assessment against their shares by the Comptroller of the Currency. The Comptroller could not sell that liability, the bank could not, but if the liquidating plan evidenced by the contract, Exhibit "F" and the creditors' agreement thereto, Exhibit 1, worked out, the necessary effect of it would be that the Comptroller of the Currency would not assess any of the share-

holders on account of statutory liability. Therefore, the language of the assignment of the shareholders of the old bank to the new bank, Exhibits "H" and "I" was an indemnity on the part of the new bank to the shareholders of the old bank against assessment by the Comptroller of the Currency of any liability as such shareholders, expressed by the new bank agreeing to hold such shareholders harmless with reference thereto.

It will be noted the new bank had until June 1934 within which to complete the payment of the 75 per cent which it had agreed to pay the creditors who signed the creditors' agreement. The new bank's agreement to hold the shareholders harmless against statutory liability being assessed against them by the Comptroller was in effect nothing more than a promise to the shareholders that the new bank would carry out the plan of liquidation outlined in the contract, Exhibit "F", and the creditors' agreement, Exhibit 1 thereto.

It will be noted, also, that the new bank agreed that if, after the liquidation was completed, anything remained, it would be distributed to shareholders under the terms of the creditors' agreement, Exhibit 1 to the contract, Exhibit "F." The assignment of the shareholders of their stock to the new bank must be considered in the light of the contract, Exhibit "F" and the creditors' agreement Exhibit 1 thereto. In effect it was the assent of the stockholders to the plan of liquidation set forth in the creditors' agreement and the contract, Exhibit"F", with the understanding that anything realized out of the assets of the old bank pursuant to that plan of liquidation which was committed to the new bank, should eventually inure to the shareholders of the old bank. Not a penny was to inure to the new bank from the assignment to it by the shareholders of the old bank. As a matter of fact,

since the bill alleges that all the shareholders executed the assignments, Exhibits "H" and "I", it affirmatively appears therefrom that what actually took place was and is that the new bank became by unanimous assent of all the shares of the old bank and by the approval and consent of the receiver of the old bank and the Comptroller of the Currency, the statutory agent for winding up the old bank under the laws of the United States, 12 U. S. C. A., Section 197.

This is true notwithstanding the fact that the trusteed assets were placed in the hands of trustees. The new bank had to name and had to control absolutely the trustees in the matter of their liquidation of the assets turned over to them. It would seem to us that there can be no doubt when the contracts here sued on are properly construed and understood that the petitioner's suit is one for the winding up of the affairs of an insolvent national bank and indeed, is against the statutory agent of the shareholders under the laws of the United States.

See, *Citizens National Bank in Waxahachie v. Citizens National Bank of Waxahachie et al.*, 9 Fed. Supp. 513.

The action here involved is, in legal effect, of the same nature as a suit to establish a claim against the receiver of the insolvent First National Bank of Meridian, and is against an agent designated by the receiver and the shareholders of the old bank to complete its liquidation, whereunder it is claimed the specific alleged debt was provided for though not in express terms.

As stated by the Court in *Guarantee Compay v. Hanway*, 104 Fed. 369, 44 C. C. A. 312:

> "An action by or against a receiver of a national bank, appointed under this Act, is an action arising

under the laws of the United States, because the Act of Congress creates his office, grants his rights and powers, and imposes his duties. In the absence of this act there would be no such receiver, and no suits against him could arise. Every action by or against him necessarily involves the exercise of some of his rights, or the proper discharge of some of his duties, and invokes a consideration of the proper construction and effect of the laws of the United States from which he derives them. For these reasons, in contemplation of law every action by or against him arises under the laws of the United States. *McDonald v. Nebraska* (C. C. A.), 101, Fed 171, 172; *Auten v. Bank*, 174 U. S. 125, 19 Sup. Ct. 628, 43 L. Ed. 920; *In re Chetwood*, 165 U. S. 458, 459, 17 Sup. Ct. 385, 41 L. Ed. 782; *Armstrong v. Trautman* (C. C.) 36 Fed. 275; *Grant v. Bank* (C. C.) 47 Fed. 673

"The same reasons bring actions by or against a shareholder's agent under the same rule."

The court said further:

"This is clearly a case for winding up the affairs of such a bank. It is a suit to take $4,000.00 from the fund realized from the collection and sale of the assets of the National Bank of North Dakota in the process of winding up its affairs under the Act of Congress, and to pay it to the plaintiff instead of permitting it to be distributed to the shareholders.

" * * * it is the nature of the action, and not the possibility of maintaining it that determines whether or not a case arises under the laws of the United States. If the case presents a question, or may present a question, to be determined by those laws and the acts of the parties under them, it arises

under the laws of the United States, which ever way the question ought to be determined * * * *

"Upon the questions presented by this claim, he was entitled to a hearing and a decision, and that decision could not be reached without a consideration of the provisions of the Act of Congress under which the defendant was appointed, and the effect of his acts thereunder. The case, therefore, arose under the laws of the United States, even if a proper decision of that question would have defeated the plaintiff."

The case of *International Trust Co. v. Weeks,* 203 U. S. 364, 51 L. Ed. 224, was an action on a contract brought in the Circuit Court of the United States for rent alleged to be due under the terms of the lease made by Henry Parkman et al. to Broadway National Bank. The defendant was agent of the shareholders of Broadway National Bank. The Court said, among other things:

"1. It is objected by the defendant in error that the Circuit Court had no jurisdiction of this case. We think otherwise. The action was clearly one to wind up the affairs of the bank"—citing *In re Chetwood,* 165 U. S. 443, and *Guarantee Company v. Hanway,* 104 Fed. 369, 44 C. C. A. 312.

In the case at bar, the respondent, First National Bank *in* Meridian is manifestly sued on the theory that it stands in the place of the receiver of the insolvent First National Bank *of* Meridian, under and by virtue of the contract filed as an exhibit to the bill.

It will be noted that in those cases against the receiver of an insolvent national bank, or against the agent of the shareholders, it was not considered material, in determining

that the case was one arising under the laws of the United States, for the plaintiff to make specific reference to the particular statute under which the receiver was acting; but the mere fact that the suit was against a receiver of an insolvent National Bank, or against the agent of the shareholders of an insolvent national bank, or to recover a tax assessed against a national bank, was sufficient to characterize it as a suit arising under the laws of the United States.

It is sufficient that the plaintiff shall have averred facts which bring the case within the control of the Federal statute.

Bell v. Kelly, 54 Fed. (2d) 395.

This was a suit in which plaintiff sought to establish a prior claim as to certain of the assets of an insolvent bank which had passed to a third party and which the plaintiff claimed had been wrongfully transferred to a third party. The suit was brought against the receiver and the third party. On the question of jurisdiction the Court said:

> "The determination of the controverted questions involved and relate to the conduct of the insolvent bank's business, the disposition of certain of its assets and the respective priorities of the receiver, the plaintiff and other persons claiming interest in or title to certain of the assets. Such a suit must be held to be within the category of suits for winding up the affairs of an insolvent banking association."

The Court sustained its jurisdiction of the case as being a suit for winding up the affairs of a national banking association.

Chabot v. McRae, 7 Fed. Supp. 113.

This was a suit in which three trustees of an insolvent national bank were substituted as plaintiff to recover upon assets which had been transferred by the board of directors to the trustees, in pursuance of the plan provided by the Comptroller of the Currency, under authority of Section 207, Title 12, U. S. C. A., to be liquidated for the benefit of unsecured creditors of the bank. On the question of jurisdiction, the Court said:

> "Even if it be assumed that such trustees are not officers of the United States—(as in cases of similar but not entirely analogous character receivers and agents have been frequently held to be)—citing authorities, there can be no escape from the conclusion that it is a case of winding up the affairs of a national banking association, within the meaning of subdivision 16 of Section 41, Title 28, U. S. C. A."

The jurisdiction of the case was upheld as a case for winding up the affairs of a national bank.

Another Federal question arising under the laws of the United States presented by the bill is this:

The bill alleges (Transcript, pp. 13-14) Sections 39-41, that the defendant bank assumed and undertook to discharge all liabilities of every kind *imposed by statute* upon the shareholders of the insolvent First National Bank of Meridian by reason of their ownership of said shares, among which liabilities was and is the liability to pay all taxes as set out in the bill.

Since the liability of a shareholder, as alleged in the bill, is imposed by statute—that is to say, by the statutes of the United States, particularly Sections 5151 and 5234, Revised Statutes (Sections 63, 64 and 192, Title 12, U. S. C. A.), the

question as to whether or not the shareholders' liability extends to the payment of the taxes in question is to be determined by the application and construction of the statutes of the United States.

The personal liability of a stockholder in a national banking association is statutory,—*Kennedy v. Gibson,* 75 U. S. 498, 19 L. Ed. 347—and cannot be controlled or limited by state statutes. *Rankin v. Barton,* 199 U. S. 228, 50 L. Ed. 163.

SUMMARY OF POINTS AS TO JURISDICTION

To recapitulate: It affirmatively appears from petitioner's pleadings that this suit is to recover state, county and city taxes assessed against a national bank that afterwards became insolvent and was placed in the hands of a receiver by the Comptroller of the Currency for winding up and liquidation, and involves the following Federal questions, necessarily arising under the laws of the United States, that appear on the face of the bill:

1. Do the assessments of taxes conform to the provisions of Section 5219, Revised Statutes (Section 548, Title 12 U. S. C. A.)—and are they such assessments as are permitted by that statute?

2. If the assessments are valid and in conformity to Section 5219, Revised Statutes, and are proper assessments against the shareholders, did the failure of the bank to pay these taxes prior to its suspension impose upon the bank, under the laws of the United States, a direct obligation to pay the taxes?

3. Did the subsequent insolvency of the bank and the appointment of a receiver cancel and avoid the obligations, if any, of the old bank to pay the taxes?

4. Under the facts alleged in this bill, were the taxes sued for a claim provable against the receiver, under the laws of the United States, and payable by him out of the assets of the insolvent bank?

5. Did the subsequent sale and transfer of assets of the insolvent bank by the receiver, and the agreement of the purchasing bank to furnish the receiver with sufficient funds to pay all debts or claims which might be established against

the receiver during the active receivership, impose upon the purchasing bank, under the laws of the United States, an obligation to pay these taxes enforceable by this suit?

All of these questions are presented by the bill itself, and their determination in favor of petitioner is essential to petitioner's recovery, and each of these Federal questions is to be determined by the application and construction of the statutes of the United States—and particularly Section 5219, Revised Statutes (Section 548, Title 12, U. S. C. A.) and those statutes prescribing the rights and duties of receivers in winding up the affairs of insolvent national banks. (Section 5234, Revised Statutes, Section 192, Title 12, U. S. C. A.)

The suit, therefore, is one which arises under the laws of the United States, within the meaning of Section 41 (1) (a), Title 28, U. S. C. A. and Section 41, Par. 16.

NO CONFLICT WITH OTHER DECISIONS OF THE SUPREME COURT OF THE UNITED STATES

The decision of the Circuit Court of Appeals in the instant case is not in conflict with *First National Bank v. Chehalis County*, 166 U. S. 440 41 L. Ed. 1069 and *First National Bank v. Kentucky*, 76 U. S. (9 Wall.) 353, 19 L. Ed. 701.

The case of *First National Bank v. Chehalis County*, supra, was a proceeding to collect shareholders' tax against a solvent and going bank, which for aught that appeared at the time the suit was instituted against it, and as at such time that judgment would be entered against it, had funds which it could devote to the payment of the shareholders' tax. A situation wholly different from the case at bar.

In the case of *First National Bank v. Kentucky*, supra, the bank was, also a solvent institution and furthermore, the tax there involved was one laid directly by the legislature of Kentucky upon the shares of the stockholders, which tax the bank was required to pay as the agent of its shareholders. There was there no effort to tax the bank directly, as here, nor was there any question as to liability of the assets and receiver of an insolvent bank to pay a shareholders tax out of the assets of the bank after insolvency, as here.

The assessment here involved is expressly condemned by the Supreme Court of the United States in a case coming up from the State of Mississippi, *First National Bank of Gulfport v. Adams*, 258 U. S. 361, 66 L. Ed. 661, decided subsequently to the two cases of First National Bank v. Chehalis County and First National Bank v. Kentucky, supra.

The invalidity of the assessment here involved is made clearly apparent by the case of First National Bank of Gulf-

port v. Adams, supra, construing statutes the legal effect of which are the same as Section 3138, Code of 1930 of Mississippi.

Further authorities to the same effect and sustaining the decision in the court below are *Ward v. Baird*, 215 N. W. 163, decided August 18, 1927, by the Supreme Court of North Dakota; *Weiser National Bank v. Jeffreys et al.*, 95 Pac. 23, dceided by the Supreme Court of Idaho; *People v. First National Bank of LaGrange*, 184 N. E. 645, decided by the Supreme Court of Illinois on the 23rd day of February, 1933; *Allen v. Bilyeu*, 198 Pac. 208, decided by the Supreme Court of Oregon; *First National Bank of Leoti v. Fisher*, 26 Pac. 482, decided by the Supreme Court of Kansas; *Head v. Board of Review*, 152 N. W. 600, decided by the Supreme Court of Iowa.

We respectfully submit that it is apparent that the decision of the Circuit Court of Appeals of the Fifth Circuit in the instant case is not in conflict with *First National Bank v. Chehalis County*, nor *First National Bank v. Kentucky*, relied upon by petitioner, but is abundantly sustained by the authorities we have cited.

Nor is there any conflict between the decision of the Circuit Court of Appeals in the instant case and the decision of the Supreme Court in *Milwaukee County v. White*, 296 U. S. 268, 80 L. Ed. 155, Advance Sheets No. 3. That decision was brought to the attention of the Circuit Court of Appeals on the argument of the case, but it is so clearly distinguishable from the case at bar that the opinion makes no reference to it.

NO ERROR IN CONSTRUCTION OF CONTRACTS, EXHIBITS "H" AND "I"

The Circuit Court of Appeals was of the opinion here that, under the facts and circumstances of the instant case, the provision in the transfer of the shareholders of the old bank to the new bank, Exhibit "H" to the bill (Transcript, p. 51) that such old shareholders should be "relieved and held harmless from any and all statutory liability as a shareholder" had reference only to the statutory liability to be assessed as a shareholder by the Comptroller of the Currency.

We submit there was no error in such conclusion, but further that the Court of Appeals, also, distinctly held with reference thereto, "moreover, there is no assumption, but only an agreement to hold harmless which would not justify a direct suit by the holder of an obligation."

The most that can be said of the contract evidenced by Exhibits "H" and "I" is that it is one for indemnity only.

There is no agreement to pay the taxes sued for, nor anything, and no assumption of liability to anybody, and no indication of the making of a contract for the benefit of anyone other than the parties thereto. At most it is an agreement to relieve and hold harmless, and as such purely one of indemnity.

In the case of *Miller v. Fries*, 49 Alt. 674, the Supreme Court of New Jersey had before it a suit brought by an obligee of a bond against the obligors, the condition of the bond being that the obligors would "save and keep harmless," the obligee from all debts and partnership liabilities existing against a certain firm of which the plaintiff was a partner. The plain-

tiff obtained judgment. But on appeal the case was reversed. The Court said:

> "One of the reasons assigned by the defendants for setting aside the verdict is 'that the verdict is against the law of the case.' This reason is well founded. The condition of the bond is 'to save and keep harmless' from certain existing debts and liabilities, and the only fact assigned and proved as a breach is that one of those debts has passed into judgment against the plaintiff. It it settled in this court that the mere existence of debts, even in the form of judgments against the covenanter, does not legally constitute the breach of a covenant to indemnify and save harmless. *Jeffers v. Johnson,* 21 N. J. Law 73. Such a covenant is not equivalent to a covenant to pay existing debts."

The contract was not made for the benefit of the petitioner and he may not sue thereon.

The Second National Bank of St. Louis v. Grand Lodge of Free and Accepted Masons of the State of Missouri, 98 U. S. 123, 25 L. Ed. 75.

In *Nehalem Timber & Logging Company v. Columbia County,* 189 Pac. 212, standing timber was sold to a purchaser. The sum of $30,000.00 was paid on the execution of the agreement. The balance was to be paid on or before a certain date specified in the contract. None of the timber was to be cut on any section until the full value of that section as set out in the contract was paid. All merchantable timber from all of the lands described in the contract was to be cut and removed prior to June 10, 1919. The contract provided the usual rights and easements for the cutting and removing of the timber. The purchaser was required to re-

move any appurtenances which it placed on the property before June 10, 1920. Under the contract, the purchaser agreed:

> "To pay, before the same became deliquent, all taxes lawfully assessed or levied on or after March 1, 1914, upon the lands described, provided, that whenever the purchaser may have paid for, cut, and removed all the timber from any section or sections, it shall not be required to pay tax thereafter levied and assessed against such section or sections."

The purchaser as plaintiff, sought to enjoin the collection of a tax alleged to be excessive and alleged, also, to have been illegally assessed directly to it. It was, also, claimed that the tax was excessive and discriminatory. The Court, in disposing of any possible question as to the right of the taxing authorities to recover by reason of the private contract between the parties with reference to the contract said:

> "It may be contended that the plaintiff has not done equity by paying or tendering the taxes computed on a valuation of the property at $2.50 per acre, and for that reason is not entitled to relief. We must remember, however, that since it has not a taxable estate in the realty, the plaintiff is not obligated to the county for any tax upon it, whatever its liability may be when the timber becomes personalty by severance from the land. True enough, it covenanted with the other contracting party to pay all taxes which may be lawfully assessed against the land until the timber is severed, but the county as a taxing power has no privity or concern with that stipulation. As said in *Williams v. Triche,* 31 So. (La.) 926:

"'No matter what may be the contract between private individuals, the state is not bound thereby, if not in exact accordance with its statutes, any more than are creditors of a succession concerned by any private arrangement made, as between themselves, by the heirs of the deceased.'"

The Supreme Court of Louisiana in *Cain v. Foote Lumber Company*, 135 So. 769, held that a tax collector could not sue a purchaser of timber upon his promise to his vendor to pay the tax thereon. Speaking to the point, the Supreme Court of Louisiana said:

"But the plaintiff says that, in the act of the sale in which the defendant secured title to the timber, it agreed to pay the taxes, and that therefore he has a right to bring this suit to enforce this promise. In order for this so-called agreement or assumption to furnish the basis of any action against the defendant by the plaintiff, it must be construed as a stipulation pour autrui. The case of *People's Homestead Association v. Garland*, 107 La. 476, 31 So. 892, involved the exact point, and, in holding that such an agreement to pay taxes was not a stipulation pour autrui, the court said:

"'In the absence of any text of law on the subject, such assumption cannot benefit the city, unless it be viewed as a stipulation pour autrui in its favor. We find nothing tending to impress that character upon the act. The matter was one purely personal to the contracting parties, exclusively in their own interest, and not in the remotest degree intended for the benefit of the city, who was not a party to the contract. The assumption by another of the tax did not relieve the party as-

sessed of his liability therefor. In contemplation of law, he remained the tax debtor. It merely gave him the right to recoup himself against his vendee in case he were compelled to pay the tax assumed by the latter, but conferred no rights on any one else. Thus it has been held that a stipulation that a certain sum shall be paid to a third person towards the extinguishment of a debt due to him from one of the parties to the contract is not a stipulation pour autrui, but that the assumption of the debt is part of the consideration or price of the property intended exclusively for the benefit of the stipulating party. *Tiernan v. Martin,* 2 Rob. 523.'

"In the present case the promise of this defendant to pay the taxes on this timber for the year 1929 was a matter purely personal between the defendant and its vendor. The promise was not made for the benefit of the state or parish or any other body to whom the taxes might be due. It was merely an agreement on the part of the defendent to hold its vendor harmless as to the taxes. If at any time its vendor, B. E. Smith Land & Lumber Company, should be called on to pay these taxes, then under its contract it could call on the defendant to pay them. That is the full extent of the obligation."

The same view is intimated very strongly by the Supreme Court of the State of Mississippi in the case of *Puffer Manufacturing Company v. Robertson,* 73 So. 804, 112 Miss 890. In that case, Puffer Manufacturing Company had leased to McIntyre Drug Company the soda fountain. Under the contract, the lessee agreed to pay the taxes as between it and the lessor. A contract of similar nature had been construed by the Supreme Court in the case of *Puffer Manufacturing Com-*

pany v. Dearman, 97 Miss. 622, 54 So. 310, as a contract of lease and not a conditional sale. The revenue agent sought to back assess the Puffer Manufacturing Company as lessor, owner of the property with the taxes; hence, the suit. Puffer Manufacturing Company contended that the lease was in fact a conditional sale and that the taxes should be assessed against its lessee. The Court adhered to the rule in Puffer Manufacturing Company v. Dearman, supra, holding the contract one of lease and not of sale, and declared that under the tax law, the owner of the property for the purposes of assessment is meant the legal and not the equitable owner and that the lessor was rightly assessed with the tax.

While conceding that as between the lessor and lessee, it might be the duty of the lessee to pay the tax and that the lessor might enforce that duty, the Court said:

> "That may be true in this case, if this was a suit between the lessor and lessee, indeed, the contract specifically provides that the lessee shall pay the taxes, but this is a suit between the state and the owner of the legal title, and for the purposes of assessment the state will look to him, and he can look to the lessee for reimbursement, if he is entitled thereto. It is important to keep in mind the parties to this suit.
>
> "It is unthinkable to us that the taxing officers must institute inquiries as to the equities between the parties to private contracts. It is only necessary that they ascertain the holder of the legal title, and leave to a court of equity the onerous and delicate job of fixing the duties and obligations of each of the contracting parties as between themselves."

"Intent to make obligation inure to benefit of third parties must clearly appear in contract and if there is doubt, it should be construed against such intent." *Cannonball v. Grasso,* 59 S. W. (2d) 337.

"Contract for third person's benefit should be construed with reasonable strictness against third person." *Commissioner of Internal Revenue v. Keller,* 59 Fed. (2d) 499.

"Agreement by certain stockholders of corporation to indemnify accommodation endorsers on corporation's note against loss by reason of endorsement, held not a benefit for holder of note and did not entitle holder to recover against indemnitors after obtaining judgment against one of indemnities." *National City Bank v. Berwin,* 270 N. Y Supp. 678.

No liability exists as against the respondent to pay any prior tax due by any person on shares of stock simply by virtue of the fact that the legal title thereto has been assigned to the respondent. No personal liability therefor arises. See, *Anderson v. State,* 23 Miss. 459.

If it should be said that the taxing authorities had a lien on the shares of stock and that the respondent acquired the stock subject to such lien for the tax, it still remains true that there is no personal liability for the tax as against the respondent, thereby arising. The assignment would simply be subject to the tax, the lien if any, could be enforced against the shares, and against the shares only, so far as this respondent is concerned.

See, *Wilberg v. Yakima,* 231 Pac. 931, 41 A. L. R. 184, Note.

RESPONSE TO PETITIONER'S POINT 2

There is no conflict between the decision in the instant case and that of other Circuit Courts of Appeal.

The case of *Fourth National Bank v. City of Boston*, 300 Fed. 29, is not applicable here, nor is it sound authority against our position. That was a suit by a National Bank against the City of Boston, in which the Court held that the bill was not good as one giving jurisdiction to the Federal Court where the bank, suing to recover taxes, only alleged that the authorities of the defendant City, "purporting to act under a state statute, assessed a tax on such shares at a greater rate than was assessed on moneyed capital in the hands of individual citizens of that state, that the tax was assessed and collected without warrant of law and contrary to the provisions of the statute and the laws of the United States was too uncertain and ambiguous and did not clearly present a Federal question." Manifestly, the decision is not controlling here, for the reason that it has been repeatedly held since then and by the Supreme Court of the United States, that the Courts of the United States do have jurisdiction of bills filed by national banks on behalf of the shareholders to recover taxes paid on the ground that the state taxing laws discriminated against the shares of national banks, and in favor of other moneyed capital employed in competition therewith. See the following:

Calloway v. Bohler, (D. C. Ga.) 291 Fed. 245, approved 297 U. S. 479, 69 L. Ed. 745.

Charleston National Bank v. Mellon, 171 Fed. 743.

The case of *Thompson v. Standard Oil Company*, 67 Fed. (2d), 644, is easily distinguishable from the one at bar. There the plaintiff sought to recover on the theory that he had pre-

viously brought suit against the Standard Oil Company in the Federal Courts based on diversity of citizenship and seeking damages for alleged breach of contract. Thompson, the plaintiff, claimed that in answer to his suit in the Federal Court, the defendant had libelled him with express malice and in utter disregard of the truth to his great damage. The District Court, when the case came before it on motion to remand, retained jurisdiction.

See. 60 Fed. (2d), 162.

On appeal to the Circuit Court of Appeals of the 4th Circuit, two of the Judges of the Court of Appeals reversed the decision of the lower Court, holding, in effect, that the suit was one for damages for libel; and that it was not predicated upon any law of the United States, but arose under the general law. In other words, the Court held that the District Court of the United States did not have, originally, jurisdiction of a suit "merely because the acts of the defendant complained of, took place in a proceeding in a Court of the United States."

It will be interesting to note, however, that Circuit Judge Parker vigorously dissented and supported his position with a very able opinion to the contrary, upholding the decision of Judge Cochran in 60 Fed. (2d), 162. The case, however, is so foreign on its face to the one before the Court here, that we think further comment unnecessary.

The case of *Southern Broadway National Bank v. City and County of Denver*, 51 Fed. (2d) 703, is differentiated from the case at bar in this: Southern Broadway National Bank, a solvent and going concern, sued to recover taxes which it had paid in the year 1928 as valorem taxes levied in 1927, claiming an alleged duress. The defendant answer-

ed its bill to recover the tax already paid, admitting certain of the allegations and denying others, and alleging that the manner in which the assessment was made, of which the plaintiff complained, was done at the plaintiff's request.

No case is influential further than the facts that were before the Court and that which the Court was dealing with when it made the decision. The answer embodied a demurer to the complaint which was sustained when the case came on for hearing and the plaintiff appealed. The plaintiff had alleged that the tax levy was invalid and illegal on three grounds.

1. The manner of the assessment was illegal.

2. There was discrimination against the National Bank, in that certain of its properties were by the assessment assessed, whereas like property of others in competition with National Banks was not taxed at all.

3. That the assessment was made at full value of the shares whereas other moneyed capital in Denver was not assessed at higher valuation than 75 per cent, if assessed at all.

The only thing involved there was the right of the bank to recover the tax after it had once been paid. No question of the validity of such a claim as against the assets and receiver of a closed or insolvent bank was involved in the slightest degree.

The Court reviewed the Federal law and the statutes of the State of Colorado, and the allegations of the plaintiff's bill with reference to the matter of the assessment, and pointed out that the bill of complaint of the plaintiff bank seeking to recover the tax, did not show that the bank, in making the return, had complied with the terms of the statute.

Under the facts of that particular case, wherein the bank was seeking to recover a tax which it had been a party to having assessed to it, and which it had already paid, has no application to the facts of the case at bar.

RESPONSE TO PETITIONER'S POINT 3

There is no conflict between the decision of the Court of Appeals in the instant case and applicable local laws.

On page 16 of their brief, Counsel for petitioner refer to Section 3120 of Mississippi Code of 1930, but do not quote the Section in full. In full, it reads as follows:

> "Taxes, both state and county, assessed upon lands or personal property, shall bind the same, and be entitled to preference over all judgments, executions, encumbrances, or liens, whensoever created; and all taxes assessed shall be a lien upon and bind the property assessed, from the first day of January of the year in which the assessment shall be made; and no property shall be exempt from distress and sale for taxes. And it shall not be necessary to the validity of an assessment, or of a sale of land for taxes, that it shall be assessed to its true owner; but taxes shall be a charge on the land or personal property taxed, and the sale shall be a proceeding against the thing sold, and shall vest title in the purchaser, without regard to who may own the land or other property when assessed or when sold, or whether wrongfully assessed, either to a person, or to the state, or any county, city, town or village, or subdivision of either."

The following points are manifest from the foregoing statute, to-wit:

1. There must be a valid assessment before there can be any character of lien.

2. In case there is an assessment that is valid, the lien specified in the statute is only against the thing that is as-

sessed—that is, the land or personal property assessed. It is not a general lien against all the assets of the taxpayer.

Since the state can only tax the shares in a national bank to the shareholders thereof, and since the state statute expressly provides only for an assessment of the shares themselves to the shareholders, and since Section 3138 does not undertake to make the assets of a national bank liable for the tax, the only lien that can exist by virtue of an assessment of shares of stock in a national bank is a lien on the shares of stock in a national bank is a lien on the shares themselves belonging to shareholders. Any lien upon the assets of a national bank itself for any tax assessed against, and to be collected of, the shareholders on their shares, is necessarily excluded by the very terms of Sections 3120 and 3138 of the Code of 1930 of Mississippi.

3. Any sale for delinquent tax under Section 3120 is expressly a proceeding against the property taxed—in this case claimed to be the shares of stock. But the shares were not, in fact, assessed.

It is clear, when Sections 3120 and 3138 are read together, that any lien for a tax legally assessed to shareholders on their shares in a national bank, is not only a lien solely on the shares, but that in case of delinquency in payment, any proceeding to sell the assessed proerty or collection of the delinquent tax is against the property assessed, to-wit: the shares only.

SHARES NOT LEGALLY ASSESSED

The fallacy of petitioner's position is that he is not proceeding in the case at bar against the property claimed to have been assessed, to-wit: the shares of stock. He did not contend in the Court below, and does not here, that the alleged assessment per se, made the bank, as a bank, subject to the tax sued for. Knowing full well that both under the State and the United States laws, the respondent bank, as a bank, and its property could not be subject to the tax, and knowing full well that the purported assessment could only have been made legally, under either the State or Federal law, against the shares of stock themselves, and when so made could only create a liability as against the shareholders themselves for the tax, Counsel are contending that the void assessments here involved, made directly against the respondent bank, were tantanmount to an assessment of the shares of the capital stock of the National Bank, so as to subject the shareholders of the bank to the tax pursuant to such assessment.

While we contend that the purported assessments here involved are absolutely void on their face and in contravention of both State and Federal statutes, and are ineffective for any purpose whatever, yet, laying that point aside for the moment, and regardless of whether petitioner or respondent is correct as to the validity of the assessment, since this is not a proceeding against the thing assessed, but is a suit to enforce an alleged personal liability for the tax, on the theory that it is a liability of the stockholders, primarily, we submit that petitioner's bill utterly fails for two manifestly good reasons, even if the assessment were to be construed (and we say it cannot be so construed) as a valid assessment of the shares of the stock of the bank to the shareholders, to-wit:

First, in a personal action to recover a debt for a tax on the shares as a personal debt, primarily due by the shareholders, after insolvency of the bank it was absolutely necessary that the shareholders should be made parties. Under no view could the shareholders be held to be personally liable for the tax without their day in court.

Second, the receiver and the bank, under its contract with the receiver, could not be made to pay, under numerous decisions, to which we will later refer, a tax due by the shareholders, even if such tax were due and ought to have been paid prior to the insolvency of the old bank.

Discussing these points in their order, we submit as follows:

First: *Shareholders not personally liable.*

It is true that Section 3122, Code 1930 of Mississippi, is captioned:

"Taxes, a Debt Recoverable by Action."

It is also, true that the statute prescribed that "every lawful tax assessed, levied or imposed," etc., is a debt "due by the person or corporation owning the property or carrying on the business or profession upon which the tax is levied or imposed, whether properly assessed or not," and may be recovered by action. But the concluding paragraph of the section says, "and in all actions for recovery of ad valorem taxes, the assessment rolls shall only be prima facie correct."

This last clause in the section is the only thing that preserves its constitutionality, as has been held by the Supreme Court in the case of *George County v. Catlett,* 135 So. 217, from which we quote at page 219, as follows:

"Appellant contends that the statute violates due process because it fails to provide for personal service of process on the taxpayer, giving him notice and an opportunity to be heard at the equalization meeting of the board of supervisors. In considering this question, it should be borne in mind that the assessment of appellant's property was, in every respect, legal. There was no attack made upon it in the Court below, nor is there any made in this Court. The last clause of the statute provides that, in all actons for recovery of ad valorem taxes (the kind of taxes here sued for) 'the assessment roll shall only be prima facie correct.' If the law made the assessment roll conclusive as to the amount of taxes due by the taxpayers, the appellant's position would raise a very grave question; but that is not true, the assessment roll is only prima facie correct. That means that the presumption of its correctness is rebuttable. *New Orleans & G. N. R. Co. v. Walden,* (Miss.) 133 So. 241. Therefore, when an action is brought for taxes, under this statute, the taxpayer is, of course, summoned into Court by process personally served, and there given an opportunity to be fully heard, and on the trial he will be permitted to rebut if he can, the prima facie correctness of the assessment roll."

The shareholders who owned the shares of stock of the old First National Bank *of* Meridian in 1930, and whose debt Counsel claims this tax is, are not before the Court; are not parties to the original assessment upon which the plaintiff is proceeding; and the judgment assessing the property even if it sufficiently identified the property, has no conclusive or binding effect upon them. Since the assessment was not made against them, and since the assessment was a void assessment as against the old First National Bank *of* Meridian,

such shareholders are not bound by the assessment under the statute as construed by the Supreme Court under any view at least, unless and until they shall have had their day in Court by being sued for the tax, and being afforded an opportunity to rebut, in any action for the recovery of the tax against them, the merely prima facie presumption arising from the assessment roll.

The old First National Bank *of* Meridian could not have bound its shareholders who were not assessed with the tax, by paying a tax illegally assessed to the bank; and, the shareholders of the old First National Bank *of* Meridian have a right to be heard in a Court of competent jurisdiction under the terms of the statute itself before it can be declared that they are liable for the tax by virtue of the assessment.

For instance, in any suit against a shareholder on the theory that the assessment here made, created a debt on the part of the shareholder, such shareholder would be entitled to his day in, Court wherein he might contend:

That the statute had no application to the assessment of bank stock and that he could not be liable in any view of the statute for an assessment never made against him, but illegally made against another party, who could not, under the law, possibly be liable for the tax and whom the taxing officers were without authority to levy any tax against.

See also: *State v. McDonald,* 145 So. 508, 164 Miss. 405.

An assessment under the Mississippi law is a condition precedent to taxation.

State v. Adler, 68 Miss. 487.

Thibodeaux v. State, 69 Miss. 487.

State v. Tonella, 70 Miss. 701.

CASES DIFFERENTIATED

The case of *Smith v. Cassidy*, 75 Miss. 916, referred to by Counsel for petitioner, is, we submit, inapplicable here. It merely involved the validity of a tax title to land. The Court said that the taxes were a charge in rem, and that the ownership of the land was immaterial to the right and power of the state to sell for taxes. The Court, however, said that notwithstanding those facts, the purchaser at that particular tax sale got no title, because, as the syllabus shows, the person buying had estopped himself to purchase an outstanding title under the circumstances by reason of his particular improper dealings with the land. It seemed that while the land actually belonged to the United States, it was assessed to an unknown owner. While it belonged to the United States and was assessed to an unknown owner, the land was actually sold for taxes, and Cassidy purchased at the sale. The Supreme Court held such a sale was void, because the land was not taxable and that Cassidy having had the assessment changed from that of an unknown owner to himself, and then purchased the property, and having thereafter, when it did become taxable, had it assessed to himself, he could not obtain any title by such proceedings. It seems the land had never been owned by Cassidy, and when it did become taxable was the property of one Smith.

Nor is *Powell v. McKee*, 81 Miss 229, controlling here. There, briefly stated, loans of money secured by deeds of trust, payable to bearer, were made. The loans were clearly taxable as solvent credits; but the ownership was concealed by the form of recorded instrument securing them intentionally not revealing the maker and owner. In 1901, these loans were assessed by the regular assessor "as unknown solvent credits to unknown owner." The tax collector, con-

ceiving the assessment void for insufficiency of description, back assessed these solvent credits by proper descriptions to unknown owners. The taxes not being paid, the tax collector advertised the property taxed, these solvent credits, for sale, proceeding, not against the taxpayer, nor any owner, but in rem against the specific property assessed. Thereupon Powell, the trustee in the said deed of trust, filed a bill to enjoin collection, claiming that the assessments were void, because assessed to an unknown owner, that personal property had to be assessed to a person by name, that the assessment by the tax collector was void because the property had not escaped taxation so as to authorize the tax collector to proceed to back assess, and that the law giving authority to assess, where the owner has not assessed, to the tax collector, was unconstitutional under the State Constitution. The Court held the law giving the tax collector such authority was constitutional, and that an assessment of taxable property to the unknown owner thereof was not invalid, and that the solvent credits were taxable property, though they bore no earmarks of ownership. The Court said: "The taxes are due from the property itself, as well as constituting a debt from the owner; and if the latter (the owner) secretes himself, it is but just that the former (the property) adjust the demand." The Court there was dealing with a general statute, not a specific statute requiring a particular kind of assessment, such as must be made, if any is, as to shares of National Banks. Furthermore, the case dealt with an assessment to an owner, though his name was unknown; not to an assessment against one known not to be the owner, not subject at all to assessment for the tax, and one not owing any debt for taxes on the property. Again, the suit there was to enjoin a proceeding in rem, not one as here seeking to establish a debt of the owner, without making the owner a party,

for a tax never assessed to the owner in any way. The case is inapplicable on its facts.

See: *George Co. v. Catlett,* 135 So. 217, 161 Miss. 120, supra.

2. REGARDLESS OF ANY QUESTION ABOUT THE VALIDITY OF THE ASSESSMENT AS AGAINST THE OLD BANK, NEITHER THE RECEIVER NOR THE ASSETS THAT PASSED INTO HIS HANDS UPON THE INSOLVENCY OF THE OLD BANK WERE LIABLE FOR A TAX DUE BY SHAREHOLDERS ON THEIR SHARES OF STOCK IN THE OLD BANK, EVEN IF THERE WERE ANY TAX DUE, AND CONSEQUENTLY, PETITIONER CANNOT RECOVER IN THIS CASE ON ANY OF THE CONTRACTS UPON WHICH HE RELIES AND THAT WERE MADE WITH THE NEW BANK IN PROCESS OF LIQUIDATION OF THE OLD BANK BY THE RECEIVER.

The point had been expressly ruled upon in the Circuit Court of Appeals, Fifth Circuit, in the case of *Stapylton v. Haggard, Tax Collector,* 91 Fed. 93.

That decision was rendered in the full light of the case of *First National Bank v. Chehalis County,* supra. The decision is abundantly supported by the case of *Rosenblatt v. Johnston,* 104 U. S. 462; by the *City of Boston v. Beal,* 51 Fed. 306; by *Brown v. French,* 80 Fed. 166.

RESPONSE TO PETITIONER'S POINT 4

What has heretofore been said, together with the facts in the instant case, and the opinion of the Circuit Court of Appeals thereon, are deemed to be sufficient answer to petitioner's Point 4.

The case is pervaded throughout with Federal Law. It is impossible to decide it on the face of petitioner's own pleadings, without interpreting and appllying the laws of the United States.

CONCLUSION

We respectfully submit that the petition for writ of certiorari should be denied.

Respectfullly submitted,

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R. E. WILBOURN,
Attorneys for Respondent.

I, the undersigned, R. E. Wilbourn, hereby certify that I have this day delivered to Hon. J. C. Floyd, Attorney for Petitioner, at his office at Meridian, Mississippi, a true and correct copy of the foregoing brief on behalf of respondent.

This the 30th day of April, A. D., 1936.

.....
Of Counsel for Respondent.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [illegible]

NO. 29

JAMES B. GULLY, STATE TAX COLLECTOR
FOR STATE OF MISSISSIPPI ——— PETITIONER

vs.

FIRST NATIONAL BANK IN MERIDIAN
RESPONDENT

ORIGINAL BRIEF FOR RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

NO. 29

JAMES B. GULLY, STATE TAX COLLECTOR FOR STATE OF MISSISSIPPI ..... PETITIONER

VS.

FIRST NATIONAL BANK IN MERIDIAN ..... RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

ORIGINAL BRIEF FOR RESPONDENT

May it Please the Court:

Certiorari was granted herein by this court to the United States Circuit Court of Appeals for the Fifth Circuit on May 18, 1936, limited to the question of the jurisdiction of the District Court.

NOTE:—All *Italics* ours unless otherwise indicated.

James B. Gully, State Tax Collector, for the State of Mississippi, for the use and benefit of that state and certain of its political subdivisions and taxing districts, filed suit in the Chancery Court of Lauderdale County, Mississippi, against First National Bank *in* Meridian. For the bill of complaint and the exhibits thereto see Transcript, pages 1 to 40, inclusive.

Within the time which it was allowed to plead, answer or demur to the bill under the laws of the State of Mississippi, respondent filed a petition and bond for the removal of the cause to the District Court of the United States for the Eastern Division of the Southern District of Mississippi. (Transcript, pp. 40 to 44, inclusive.)

The state court entered its order transferring the case to the United States District Court. Petitioner's motion to remand (Transcript, p. 47) was overruled by the District Court.

Respondent filed an answer (Transcript, pp. 47 to 64, inclusive) and incorporated therein at the conclusion thereof, a motion to dismiss. (Transcript, pp. 64 to 67, inclusive.)

Petitioner thereupon asked leave to amend the bill of complaint. (Transcript, pp. 67 to 70, inclusive.)

Respondent objected to the proposed amendments in writing. (Transcript, pp. 70 to 73, inclusive.)

The District Court denied the motion to amend the bill. (Transcript, p. 73.)

Thereupon the motion to dismiss was heard and argued at the September Term 1934 of the District Court and at the conclusion of the hearing, the court announced orally its opinion that the motion to dismiss should be sustained. (Transcript, p. 80.)

Petitioner asked the court to withhold entry of decree and to take the case under advisement for thirty days to enable petitioner to determine whether or not to ask leave to amend. Pe-

titioner then filed a second motion for leave to amend the original bill on November 1, 1934. (Transcript, p. 76.) To this second application to amend, respondent filed written objections. (Transcript, pp. 80 to 83, inclusive.)

On further hearing, the District Court entered final decree in favor of respondent on the 27th of March, 1935, wherein the court adjudged that the bill of complaint if amended as prayed, would still state no cause of action against the respondent; that the doing of complete justice did not require the allowance of the proposed amendments; that the assessment of the taxes sought to be recovered and relied upon in the bill of complaint were not the equivalent of a tax upon the shareholders, were wholly void as being contrary to the laws of the United States and of the State of Mississippi and beyond the power of the taxing authorities and unenforceable; that the taxes sued for were not a lien upon the assets of the old First National Bank *of* Meridian in the hands of the Receiver thereof; that neither the old bank nor its Receiver were estopped to assert the invalidity of such assessments; that the motion for leave to amend the bill of complaint should be overruled; and the petitioner, asking no further leave to amend, but declining to plead further, the motion to dismiss should be sustained. (Transcript, pp. 84 to 86).

Petitioner appealed to the Circuit Court of Appeals for the Fifth Circuit at New Orleans, assigning several alleged errors. (Transcript, pp. 87 to 88).

One of the assignments of error is to the effect that the District Court erred in refusing to remand the cause to the state court.

The Circuit Court of Appeals on January 18, 1936, affirmed the decision of the District Court in an opinion whereby it upheld the judgment of the District Court in retaining jurisdiction of the cause, in overruling the applications for leave to

amend and in dismissing the bill of complaint. (Transcript, pp. 93 to 101, inclusive.)

Respondent respectfully submits that the District Court and the Circuit Court of Appeals were correct in holding that the case was properly removed from the state court.

It is significant that the entire case was disposed of in the lower court on the pleadings of the petitioner.

REPLY TO PETITIONER'S POINT I

The suit is clearly one that arises under the laws of the United States. This we submit affirmatively appears from petitioner's own pleading, which we will here analyze.

PETITIONER'S CLAIM IN THE BILL

Petitioner's bill of complaint against respondent, First National Bank *in* Meridian (hereinafter referred to as the "new bank") sought recovery of it of the taxes here involved upon the following propositions set forth in the bill to-wit:

a. That First National Bank *of* Meridian (hereinafter for convenience and brevity referred to as the "old bank") was on and prior to January 1, 1930 and throughout the entire year 1930 and until January 13, 1931, a national banking association domiciled and doing business in the City of Meridian.

b. That during the year 1930, the old bank was subject to taxation by the state and its political subdivisions "upon its capital stock, surplus and undivided profits."

c. That in the year 1930, the old bank "in strict compliance with the laws of the State of Mississippi", acting through proper officers "made due and legal report or return to the Tax Assessors of Lauderdale County, Mississippi, of the number and amount of all the shares of its capital stock paid in and of the sum of all undivided profits, surplus and accumulation of every

sort *constituting a part of the assets of said First National Bank of Meridian* excluding its real estate." See Paragraph 8, Transcript, p. 2.

d. That upon such return, the Tax Assessor of Lauderdale County "proceeded according to law to assess the said capital stock, surplus and undivided profits to said First National Bank *of* Meridian for the state and county taxes for the year 1930."

e. That such assessment was in words and figures as follows, to-wit:

"Page 12

"Name—Bank, First

"Bank's capital stock, surplus and undivided profits, less book value of real estate. $540,135.00

"Total Valuation of all Personal Property. . $ 540,135.00"

f. As to taxes alleged to be due the City of Meridian and the Separate School District thereof, petitioner's bill alleged (Transcript, p. 6, Par. 21 of the bill) that the old bank through proper officers "in strict compliance with the laws of the State of Mississippi and the charter, charter amendments and ordinances of the City of Meridian" likewise "made due and legal report or return" to the taxing officers of the City of Meridian, "of the number and amount of all the shares of its capital stock paid in and of the sum of all undivided profits, surplus and accumulation of every sort constituting a part of the assets of First National Bank *of* Meridian excluding its real estate."

g. That upon such return, the taxing officer "proceeded according to law to assess said capital stock, surplus and undivided profits to said First National Bank *of* Meridian", the old bank, for the year 1930.

h. That the entry upon the City Assessment Roll was in the following words and figures:

"First National Bank;

"2600 shares capital stock	$260,000.00
Surplus and Undivided Profits	313,890.00
	$573,890.00
Less Real Estate	33,700.00
	$540,190.00
Total Value of all Personal Property	$540,190.00
Total Tax on same	$ 13,504.75"

i. That the assessments aforesaid on the state and county and city assessment rolls were confirmed by the taxing boards.

j. That the taxes alleged to be due the State of Mississippi and the County of Lauderdale "were due by the shareholders of the said First National Bank *of* Meridian but said First National Bank *of* Meridian was, by law, liable to pay said taxes as the agent of each of its shareholders and was authorized to pay same out of their individual profit account, or to charge same to their expense account or to any other account which said shareholders might have with said Bank, all in proportion to their ownership." Par. 16 of the bill, Transcript, p. 5.

k. A similar allegation was made as to the taxes claimed to be due the City of Meridian and the Separate School District. Par. 28 of the bill, Transcript, p. 8.

1. In paragraphs 17 and 18 of the bill, Transcript, p. 5, it is charged that under the law, the taxes due the state and county "became and were debts due by the several shareholders of said First National Bank *of* Meridian"; and that it was the duty of the First National Bank *of* Meridian, the old bank, to pay same "on or before the 1st day of December 1930 and to charge same

to the individual profit accounts of its said shareholders, or to their expense accounts or to any other accounts said shareholders might have had with said Bank." Like allegations are made as to the taxes claimed to be due to the City of Meridian and Separate School District in paragraphs 29 and 30 of the bill.

m. By the 31st paragraph of the original bill, (Transcript, p. 9), it is charged as follows:

> "That during the period from January 1st, 1930, to January 13th, 1931, and also during the period from April 1st, 1930, to January 13th, 1931, and also during the period from December 1st, 1930, to January 13th, 1931, the said First National Bank *of* Meridian had in its possession and under its control divers large sums of money belonging to its said share holders, said money being both dividends declared upon the said shares as well as money on deposit in said bank to the separate accounts of said shareholders. The exact amount of such dividends and deposits is unknown to your complainant, but upon information which he believes to be true, he avers that same was as to each and every of said shareholders largely in excess of each shareholder's pro rata portion of the total taxes due the State of Mississippi, the County of Lauderdale, the City of Meridian and the Meridian Separate School District as hereinbefore set forth."

n. That the old bank did not pay the taxes on or before December 1, 1930 "out of the funds and monies of its shareholders then and theretofore in its possession" but "wholly failed, neglected and refused so to do and thereby became and was liable and indebted directly and primarily" therefor. This latter allegation is purely a legal conclusion of the pleader, having no sufficient predicate in the allegations of the bill, which both the District Court and the Court of Appeals held showed a void

assessment of the taxes in contravention of the law of the United States.

o. By the 33rd paragraph of the bill (Transcript, p. 10), it is alleged that on the 13th of January, 1931, the old bank "became insolvent, suspended business and was thereafter duly liquidated by a receiver appointed by the Comptroller of the Currency".

It is manifest that the foregoing averments of the bill of complaint, which will be found within the first thirty-three paragraphs thereof, constituted an attempt by the petitioner to establish that the taxes claimed had been legally assessed and had become a primary obligation of the old bank at the time it became insolvent, suspended business and was placed in the hands of a receiver appointed by the Comptroller of the Currency.

Manifestly, the petitioner rightly conceived that he could have no standing in any court unless he could show a claim for taxes legally assessed and constituting a primary obligation of the First National Bank *of* Meridian, the old bank, at the time of its insolvency. But such assessment of such taxes and the obligation of the old bank to pay it, and its existence as a primary obligation of the old bank at the date of the receivership depend entirely upon the law of the United States, Title 12, U. S. C. A., Section 548.

To aver the assessment and levy of the taxes as an exisiting liability of a national bank, whether the pleader specifically refers to the laws of the United States or not in express terms, necessarily asserts and claims a right which exists only by virtue of the laws of the United States and which can be enforced only if in accord with that law. To say that a tax sought to be enforced against a national bank is a lawful tax, is to say that it is lawful under the laws of the United States because the tax depends primarily upon that law, and the law of the United States is an essential ingredient of the right to tax a national bank.

Reverting again to the allegations of the bill of complaint, it is further charged:

p. That the respondent, First National Bank *in* Meridian, was organized between the 13th of January, 1931, (the day the old bank became insolvent and suspended business), and the 12th of July, 1931, "for the purpose of acquiring the assets of the insolvent First National Bank *of* Meridian and engaging in the banking business.

q. That about June 4, 1931, respondent purchased of the receiver of the old bank "certain of the assets" of the old bank, and that the purchase and sale aforesaid was evidenced "by a written contract or agreement entered into between said receiver and said First National Bank *in* Meridian pursuant to a decree of the District Court of the United States for the Eastern Division of the Southern District of Mississippi." A copy of such contract is Exhibit F to the bill of complaint.

r. That by the terms of the said contract, Exhibit F to the bill, (for which see Transcript, pp. 28 to 38, inclusive), respondent "assumed and became liable for all of the debts and liabilities of the First National Bank *of* Meridian" (the old bank) "including among others its debt and liability for all of the taxes hereinbefore mentioned." (Transcript, p. 10, par. 36 of the bill.)

But such allegation is a legal conclusion of the pleader and since the pleader made the contract Exhibit F to the bill, its terms, rather than the legal conclusions of the pleader, will control. *Home Insurance Company v. Newman,* 111 So. 455, 147 Miss. 237. The contract, Exhibit F, nowhere expressly assumed the payment of the alleged taxes. Indeed they were not referred to therein. Petitioner was not a party to such contract.

It will be noted that it is not alleged in the bill that respondent did not comply with its contract with the receiver to deliver to him the various claims which the new bank held under a creditors agreement with creditors of the old bank, which creditors' a-

greement was an exhibit to, and part of, the contract, Exhibit F to the original bill, nor that it did not comply with its agreement to deliver to the receiver the amount of money specified, to enable the receiver to pay in full the claims of all known creditors who had not executed the aforesaid creditors' agreement. Nor was it alleged that the respondent had failed to pay the receiver any further sums demanded by him from time to time during the period of the active receivership, which the receiver might deem necessary to meet receivership expenses and to provide for the payment of "such unlisted or unknown claims as may be established during the period of active receivership."

s. By the 37th and 38th paragraphs of the bill of complaint, (Transcript, p. 10), it is alleged that the claimed taxes had not been paid by the new bank, nor by any person or corporation whatsoever.

At this point, we submit, it will be helpful on the point of jurisdiction to consider somewhat in detail, the contract, Exhibit F to the bill of complaint.

ANALYSIS OF THE CONTRACT BETWEEN THE RECEIVER OF THE OLD BANK AND THE NEW BANK, EXHIBIT F TO THE ORIGINAL BILL OF COMPLAINT.

Exhibit F, which bears date June 4, 1931, is found beginning on page 28 of the Transcript. C. P. Rogers, receiver of the old bank is referred to as the "party of the first part", and respondent, the new bank, is referred to as "the purchaser, party of the second part".

The second, third, fourth and fifth paragraphs of Exhibit F begin with the term "whereas" and contain certain recitations, which, however, are not the obligations that the parties to the contract assumed. (Transcript, pp. 28, 29)

The actual obligations entered into by the parties are contained in paragraphs specifically numbered 1, 2, 3, 4 and 5. (Transcript, pp. 29 to 33, inclusive).

In the clauses preliminary to the actual contract between the parties, (Transcript, pp. 28, 29), it is in substance recited that the old bank had suspended the 13th of January, 1931; that C. P. Rogers was the duly appointed and qualified receiver of the old bank; that approximately 90.59% in amount of the unsecured depositors and creditors of the suspended bank "have heretofore, for the purpose of facilitating the organization of a new bank to acquire the assets of said suspended bank *so as to enable said assets to be liquidated by said new bank as a going concern rather than to subject said assets to liquidation through a receivership*", executed certain contracts to a committee whereunder they assigned their claims to such committee for the purpose of enabling such claims to be transferred to, and utilized by, said new bank in purchasing and acquiring the assets of the suspended bank, a draft of the form of such creditor's agreements being made Exhibit 1. This Exhibit 1, entitled "Creditor's Agreement", will be found beginning page 34 of the Transcript. It was further recited that the new bank had been organized and authorized to do business by the Comptroller of the Currency and had acquired from the committee of creditors named in the creditor's agreement, Exhibit 1 to the contract, Exhibit F, the assigned claims aggregating approximately 90.59% in amount of the unsecured creditors of the suspended old bank; and that the new bank was ready and willing as purchaser under the contract, Exhibit F, to acquire the assets of the suspended bank (the old bank) and in consideration thereof "will surrender to the receiver canceled and discharged receiver's certificates representig the claims of the creditors executing the aforesaid creditors agreements aggregating approximately the said sum of $3,264,765.68, and in addition thereto said purchaser will assume and pay in full with interest the claims of all other creditors against said suspended bank, whether said claims be known or unknown, which

may be duly established according to law, and in addition will assume and pay in full all expenses of the receivership of said suspended bank, both accrued and to accrue, including the customary charge of the Comptroller of the Currency for supervision of the receivership."

After making the foregoing recitals, the contract then proceeds (Transcript, p. 29) "it is, by the parties hereto, in consideration of the mutual promises and covenants to each other hereunto flowing, as hereinafter set forth, agreed as follows". Then follow the paragraphs numbered 1, 2, 3, 4 and 5 of the contract, Exhibit F. (Transcript, pp. 29 to 33).

By paragraph numbered 1 (Transcript, p. 29), the new bank, respondent, bought, and the receiver sold, all of the assets of the suspended bank (the old bank) "exclusive of assessment liability of shareholders and liability if any, of directors of said suspended bank." It was, also, stipulated, however, in paragraph numbered 1, that respondent, the new bank, should acquire no right to take over and maintain the trust department business of the suspended bank (the old bank).

The method of payment for such assets is set forth in paragraph numbered 2, (Transcript, pp. 30, 31), as follows:

(a) Surrender to the receiver all canceled receiver's certificates for approximately 90.59% in amount of the claims of known unsecured depositors and creditors of the suspended bank.

(b) The sum of $397,888.78 "representing the amount necessary to pay all receivership expenses accrued and to accrue and to enable the receiver to pay in full with interest to the date of payment the claims of all known creditors who have not executed the aforesaid creditors agreement (it being the intention and purpose of the parties hereunder that the aforesame sum of $397,888.78 hereunder paid, together with the cancellation, surrender and return of the aforesaid receiver's certificates representing the claims of creditors executing the above mentioned creditors agree-

ments shall together completely discharge, or enable the receiver to discharge, the claims of all known creditors of said suspended bank and meet in full all receivership expenses accrued and to accrue and meet in full all receivership expenses accrued and to accrue during the period said receivership is, in the discretion of the Comptroller of the Currency, continued in active operation), and said purchaser will pay the receiver such further sums from time to time, during the period of active receivership, as the receiver may deem necessary to meet receivership expenses and to provide for the payment of such unlisted or unknown claims as may be duly established *during the period of active receivership.*"

It was further stipulated that the $397,888.78 might at the option of the receiver be retained by the receiver from the cash assets in his hands.

It was, also, agreed that in the event the $397,888.78, together with such further sums so paid as the receiver may from time to time deem necessary, should be found by the Comptroller of the Currency to be more than sufficient to pay said receivership agreements, the surplus would be paid by the receiver to the trustees provided for in the creditors agreements, a form of which was Exhibit 1 to the contract, Exhibit F.

By paragraph numbered 3 of the contract, Exhibit F, (Transcript, p. 31), the respondent, the new bank, as purchaser agreed that the purchase, as to the assets which it would acquire but was obligated to transfer to the trustees under the creditor's agreement, Exhibit 1, (Transcript, p. 34), for liquidation in the manner therein provided, should be subject to the requirement that in liquidating the trusteed assets, an accurate record should be kept thereof; and that after the trusteed assets referred to in the creditors' agreemnet, Exhibit 1, (Transcript, p. 34), had been liquidated pursuant thereto and the amount due creditors thereunder had been paid in full with interest, (without, however, any obligation upon the respondent, the new bank, to pay the portion

of the claims of depositors and creditors represented in the trusteed assets or any interest thereon), "the surplus, if any, then remaining, and/or the portion, if any, of such trusteed assets then unliquidated, shall be held for the account of the shareholders of said suspended bank and for payment and/or delivery to such representative or trustee of said shareholders as may be designated by said shareholders to receive said surplus so remaining."

The respondent, also, agreed in said paragraph numbered 3 of the contract, Exhibit F, (Transcript, p. 31), to transfer to the trustees under the creditors' agreement and in accordance therewith all of the assets turned over to it by the receiver under the contract, to be liquidated by such trustees pursuant to the terms of such creditors' agreement, Exhibit 1 (Transcript, p. 34), except certain assets which the respondent should retain absolutely as its own property. The assets which the new bank was to retain absolutely as its own property and the only assets that it could retain absolutely as its own property are listed, (Transcript, p. 32), as follows:

(a) All furniture and fixtures at an agreed valuation of $37,399.94;

(b) All real estate at an agreed valuation of $41,362.60;

(c) All claims and warrants (other than notes and bills receivable) at an agreed valuation of $24,891.63;

(d) All stocks at an agreed valuation of $1,352.00;

(e) All Bonds at the prevailing market value as of date of delivery by the receiver to said purchasing bank.

(f) A sufficient amount of notes and bills receivable, at face value as of date of suspension (exclusive of all uncollected interest upon said notes and bills receivable) to be selected by the purchasing bank, as shall, together with the assets enumerated in the foregoing sub-paragraphs a, b, c, d, and e, equal the

amount of the liabilities of the creditors absolutely assumed and agreed to be paid by the purchasing bank under said creditors' agreements.

The transfer of assets under the contract, Exhibit F, was specifically made without recourse or warranty on behalf of, or against, either the suspended bank, (the old bank), or the receiver. (Transcript, p. 33). The receiver, also, agreed to turn over to the respondent, all the contracts for rental of safety deposit boxes and all safe keeping items and the respondent, the new bank, assumed responsibility therefor.

In paragraph numbered 5 (Transcript, p. 33), the respondent obligated itself to furnish suitable quarters on its banking premises to the receiver, including light, heat, janitor service, vault space, use of furniture and fixtures such as might be considered by the receiver as necessary for the receivership purposes during the period of the active receivership.

For a further understanding of the contract between the respondent, the new bank, and the receiver, reference should, also, be made to the creditors' agreement, Exhibit 1 thereto, set forth pages 35 to 38, inclusive, of the Transcript.

CREDITORS' AGREEMENT, EXHIBIT 1 TO CONTRACT, EXHIBIT F TO THE ORIGINAL BILL, ANALYZED.

This creditors' agreement was by the terms of the contract, Exhibit F, expressly made a part of it, and explains, as well as characterizes the contract, Exhibit F as being one expressly intended and actually having the effect of, providing for the liquidation of the old bank, First National Bank *of* Meridian by the new bank, First National Bank *in* Meridian, through trustees referred to in the creditors' agreement and in the manner set forth in the contract, Exhibit F, and in such creditors' agreement.

From the creditors' agreement, it appears that prior to the actual organization of the new bank, creditors of the old bank transferred their claims to a committee for the proposed new bank (the present respondent) upon the understanding that such committee would establish the claims of such creditors as made assignments of their claims to the committee, and would obtain a receiver's certificate therefor, unless one had already been issued to the assignor, with the further understanding that when the new bank was organized with a cash capital of $400,000.00 and a cash surplus of $100,000.00, such claims would be transferred to it by the committee.

The obligations assumed by the new bank to the creditors assigning their claims under the creditors' agreement, which was, also, a part of the new bank's contract with the receiver, were as follows, as set forth in paragraph III of the creditors' agreement:

1. To pay such creditors who assigned their claims 75% thereof in installments as follows: 10 percent on the opening of the new bank; 15 percent twelve months from the date thereof; 25 percent twenty-four months thereafter, and 25 percent thirty-six months thereafter, all without interest.

2. As to the remaining 25 percent of the assigned claims, the new bank did not assume nor agree to pay same, but did obligate itself to set apart in a trust fund and transfer to trustees to be named by the board of directors of the new bank, approximately $1,254,760.09 par value of certain loans and discounts of the old bank to be acquired of the receiver thereof by the new bank, such assets to be liquidated by the trustees on the following terms:

a. The trustees should convert the same into cash without compensation to themselves and without expense except such as is necessarily incurred in the process of liquidating same.

b. During two years from the date of the opening of the new bank, it was to have the right to substitute any assets in its hands acquired from the receiver of the old bank for a corresponding amount of cash in the hands of the trustees derived by them from liquidating the trusteed assets and the right to substitute in lieu of cash by it delivered to the trustees, a corresponding amount of trusteed assets if the new bank should so elect, and the right to exchange with the trustees any assets of the new bank acquired from the First National Bank *of* Meridian for a corresponding amount of trusteed assets, all with proper adjustments of interest, with the further right in the new bank to be reimbursed by the trustees, the expenses of the receivership of the old bank accrued and to accrue during the period of the receivership. The primary object of this provision as is manifest upon a consideration of it, was to insure the solvency of the new bank and its being able to perform its obligation to pay to the creditors who assigned their claims within the period of three years as stipulated in the creditor's agreement, the 75% of their claims which the new bank would assume.

c. After the expiration of the two years within which the new bank would have the right of substitution and exchange of assets as aforesaid, the trustees were then to distribute from time to time to the creditors who assigned their claims, the proceeds of the liquidation of the trusteed assets, applying same toward the payment of the remaining 25% of their claims against the old bank, which the new bank had not assumed, but which were to be taken care of out of the trusteed assets, if sufficient to pay the same. The distribution to the creditors who assigned their claims, of the proceeds of the liquidation of the trusteed assets after the expiration of two years, was to be in ratable proportion to the amount of their respective claims. If, after applying the proceeds of the trusteed assets ratably and proportionately to the discharge of the 25% of the claims of the creditors signing the agreement against the old bank which the new bank had not assumed, together with interest thereon in full, any amount re-

mained in the hands of the trustees, such excess was to be distributed ratably to the shareholders of the old bank.

d. The trustees were given in paragraph d of section III of the creditors' agreement (Transcript, p. 36) large powers as to foreclosing liens, reducing notes to judgment, selling and conveying real and personal property, and other of the trusteed assets, and to settle and compromise with debtors of the trust estate "on such terms as the trustees may deem advisable by and with the approval of the board of directors of the new bank." The new bank, as the Court will see, was not only required to name the trustees and transfer the trusteed assets to them, but to control their actions through its board of directors. This is made more emphatic by paragraph f of section III (Transcript, p. 37) whereby the board of directors of the new bank might require the trustees to render accounts to them, might exact bond of them for the faithful discharge of their duties, might remove any trustee at any time, with or without cause, might fill any vacancy in the office of the trustees occasioned by their removal, or resignation, or death or inability to serve.

The new bank and the trustees were authorized by the creditors' agreement to execute a trust agreement as to the assets agreed upon to be trusteed on the terms set forth in the creditors' agreement.

The creditors signing the creditors agreement accepted in full of their claims, the obligation of the new bank to pay absolutely 75% thereof in the manner hereinabove stated and such amounts as might accrue to them out of the liquidation of the trusteed assets by the trustees named and supervised by the new bank on the conditions of the trust as set forth in the creditors' agreement.

The creditors' signing this agreement of course, were doing so in advance of the organization and opening of the new bank. Consequently, by section V of the creditors' agreement,

(Transcript, p. 38), the creditors signed and agreed to be bound thereby on the following subsequent conditions, namely:

1. That the new bank should be organized and opened and purchase the assets of the old bank from the receiver thereof, "as provided by law". This could only mean of course, the laws of the United States. The new bank could not be organized nor opened nor purchase the assets of the old bank of the receiver thereof, except pursuant to the laws of the United States.

2. That the new bank would assume 75% of the claims of the creditors signing the agreement, absolutely, and would place in accordance with the terms of the creditors' agreement, in trust the stipulated amount of loans and discounts, approximately par value $1,254,766.09, for the primary purpose of applying the net proceeds of the liquidation thereof by the trustees, after the new bank should have had its agreed rights of substitution and exchange of assets with the trustees for two years, toward the liquidation of the remaining 25% of the claims of the creditors signing the agreement.

3. That in the event the new bank did not open within four months of February 15, 1931, the committee would retransfer the claims and receiver's certificates issued therefor, to the creditors signing the agreement.

In the light of the foregoing allegations of the original bill of complaint and the contract, Exhibit F to the bill, we submit it appears from the petitioner's own pleadings that the suit necessarily arises under, and depends upon, the laws of the United States and requires the construction and application of such laws to the state of facts presented by the petitioner on his pleadings. Indeed, the case was decided both in the District Court and in the Circuit Court of Appeals with reference to the laws of the United States. The case cannot be decided, we respectfully submit, without construing and applying the laws of the United States.

Summarizing the Federal questions presented by the petitioner's pleadings as we conceive them to be, they are as follows:

1. The right to tax a national bank or the shares of its stock is grounded upon the laws of the United States. National banks are Federal Agencies. The state and its political subdivisions are without authority to tax national banks or national banks' stock except by permission of Congress. The laws of the United States do not simply limit a theretofore existing general right of the states to tax national banks, but are the sole source of the States' authority in such matters.

2. For petitioner to maintain the right to collect the taxes claimed, he must show that the assessments of such taxes conform to the provisions of Section 5219, Revised Statutes, Section 548 of Title 12, U. S. C. A. and are such as are permitted by that statute. The validity vel non under the Federal law of the assessments is a fundamental question presented on the face of petitioner's pleadings, and the District Court and Court of Appeals decided that question on the petitioner's pleadings in the light of the Federal statutes, against the petitioner, upon the respondent's motion to dismiss, which of course, has the same effect as a demurrer would have under the old practice.

3. But, regardless of the validity vel non of the assessments of the taxes under Section 5219 of the Revised Statutes, before petitioner could recover, it was further necessary on petitioner's pleadings, to determine whether or not under the laws of the United States, the failure of the old bank to pay these taxes which the petitioner claimed were originally a debt of the shareholders, prior to its suspension, imposed upon the old bank under the laws of the United States a direct obligation to pay same.

4. It was, also, a question under the facts alleged in the bill, as to whether or not the taxes sued for, constituted a claim

provable against the receiver, under the laws of the United States, and payable by him out of the assets of the insolvent bank in his hands. Even though the receiver was not originally made a formal party to the suit, it was certainly essential to petitioner's right to avail of the contract between the new bank and the receiver, Exhibit F to the bill, to establish that the taxes were payable by the receiver out of the assets of the old bank. Unless the taxes were enforceable against the receiver, and payable out of the assets of the old bank in his hands, there is no term of the contract between the receiver and the new bank, the respondent here, which could possibly be construed as in anyway obligating the respondent to pay such taxes. In other words, the applicability of the contract, Exhibit F, necessarily turned upon whether or not under the laws of the United States, the petitioner's claim was one that the receiver could legally pay, and was obligated to provide for and did provide for, in the contract for the sale of the assets of the old bank to the new bank.

5. The existence, validity and enforceability of the contract between the receiver and the respondent, Exhibit F to petitioner's bill of complaint, were necessarily asserted by the petitioner. The solution of these questions turned upon the laws of the United States with reference to the administration of the assets of insolvent national banks. The authority of the receiver to make the contract, depended upon the laws of the United States. Unless the contract between the receiver and the respondent conformed to the applicable laws of the United States with reference to administering the assets of an insolvent bank, it could not be held to be valid nor enforceable.

The above Federal questions presented by the petitioner's pleadings necessarily involved the construction and application of Section 5219, Revised Statutes, Section 548, Title 12, U. S. C. A. and those statutes prescribing the rights and duties of receivers in winding up insolvent national banks, Section 5234, Revised Statutes, Section 192, Title 12, U. S. C. A. Therefore,

the suit is one which arises under the laws of the United States within the meaning of Section 41 (1, a), Title 28, U. S. C. A., and Section 41, Par. 16.

6. Petitioner's bill of complaint, also, sought recovery of the taxes upon the theory that the respondent had purchased all the shares of stock of all the shareholders of the old bank and that the consideration for such purchase was that the respondent "should, after its organization and opening relieve the said shareholders of all statutory liability imposed upon them as shareholders in said First National Bank *of* Meridian." See paragraph 39 of the original bill, Transcript, p. 10.

The contracts upon which this allegation was based, are made Exhibits H and I to the original bill. It was claimed in the bill that these contracts were made during the promotion or organization of the respondent bank, and that upon its organization, it ratified and confirmed same. (Transcript, p. 11).

The contracts, Exhibits H. and I, will be found, pages 39 and 40 of the Transcript.

These contracts are to be construed in the light of the provisions of the creditors' agreement signed by some 90% or more of the creditors of the old bank, Exhibit 1 to Exhibit F to the bill of complaint, and found, Transcript, pp. 34 to 38, inclusive, which contract, we have heretofore analyzed and reviewed.

The contracts, Exhibits H and I, are especially to be interpreted in connection with paragraph e of the creditors' agreement. (Transcript, p. 36).

As a part of its contract with the receiver, made with the approval of the Comptroller of the Currency, the new bank, which was authorized by the Comptroller to begin business subsequent to the insolvency of the old bank, was obligated to supervise the liquidation of the trusteed assets, and the contract, Exhibit F and the creditors' agreement, Exhibit 1 thereto, mani-

fest the intent of the contract on the part of the receiver and the Comptroller of the Currency to assure the ability of the new bank to perform its agreement as to the 75% which it agreed to pay to the creditors who signed the agreement, Exhibit 1, and its ability to carry out its obligations under the contract to supervise and require the completion of the liquidation of the trusteed assets, and its ability to be in position during the period of the active receivership to respond to the demands of the receiver for funds with which to pay any unknown claims established during the period of the active receivership.

The bill shows that the shareholders acquiesced in the contract, Exhibit F, by transferring, on the terms of the contracts, Exhibits H and I, their stock to the new bank, not upon the theory that the new bank would assume and pay the shareholders' statutory liability, but that the accomplishment of the plan of liquidation manifested by the contract, Exhibit F and Exhibit 1 thereto, would have the logical effect when worked out, of leaving no statutory liability to be assessed upon the shareholders by the Comptroller of the Currency and would thereby relieve the said shareholders of such statutory liability. There was no agreement of the new bank to assume the shareholders' statutory liability for assessment against their shares by the Comptroller of the Currency. The Comptroller could not sell that liability, the bank could not, but if the liquidating plan evidenced by the contract, Exhibit F and the creditors' agreement, Exhibit 1 thereto, worked out, the necessary effect of it would be that the Comptroller of the Currency would not assess any of the shareholders on account of statutory liability. Therefore, the language of the assignment of the shareholders of the old bank to the new bank, Exhibits H and I was an indemnity on the part of the new bank to the shareholders of the old bank against assessment by the Comptroller of the Currency of any liability as such shareholders expressed by the new bank agreeing to hold such shareholders harmless with reference thereto.

It will be noted that the new bank had until June 1934 within which to complete the payment of the 75% which it had agreed to pay the creditors who signed the creditors' agreement. The new bank's agreement to hold the shareholders harmless against statutory liability being assessed against them by the Comptroller was in effect nothing more than a promise to the shareholders that the new bank would carry out the plan of liquidation outlined in the contract, Exhibit F, and the creditors' agreement, Exhibit 1 thereto.

It will be noted, also, that the new bank agreed that if, after the liquidation was completed anything remained, it would be distributed to shareholders under the terms of the creditors' agreement, Exhibit 1 to the contract, Exhibit F. The assignment of the shareholders of their stock to the new bank must be considered in the light of the contract, Exhibit F and the creditors' agreement, Exhibit 1 thereto. In effect it was the assent of the stockholders to the plan of liquidation set forth in the creditors' agreement and the contract, Exhibit F, with the understanding that anything realized out of the assets of the old bank pursuant to that plan of liquidation which was committed to the new bank, should eventually inure to the shareholders of the old bank. Not a penny was to inure to the new bank from the assignment to it by the shareholders of the old bank. As a matter of fact, since the bill alleges that all the shareholders executed the assignments, Exhibits H and I, it affirmatively appears therefrom that what actually took place was and is that the new bank became by unanimous assent of all the shares of the old bank and by the approval and consent of the receiver of the old bank and the Comptroller of the Currency, the statutory agent for winding up the old bank under the laws of the United States, 12 U. S. C. A., Section 197.

This is true notwithstanding the fact that the trusteed assets were placed in the hands of trustees. The new bank had to name, and had to control absolutely, the trustees in the matter

of their liquidation of the assets turned over to them. It would seem to us that there can be no doubt when the contracts here sued on are properly construed and understood that the petitioner's suit is one for the winding up of the affairs of an insolvent national bank and indeed, is against the statutory agent of the shareholders under the laws of the United States.

The Court of Appeals correctly construed the contracts, Exhibits H and I, as being applicable to the liability to be assessed on the stock to pay the bank's debts under Title 12 U. S. C. A., Section 64 and not as relating to any possible liability of shareholders for back taxes. The Court of Appeals further said with reference thereto, "moreover, there is no assumption but only an agreement to hold harmless, which would not justify a direct suit by the holder of an obligation".

The final determination, however, of the question raised by the petitioner with reference to the phase of the suit presented by Exhibits H and I to the bill of complaint in no way effects the fundamental proposition that petitioner's suit when correctly analyzed, and Exhibits H and I are considered in the light of the other allegations of the bill of complaint and especially, the creditors' agreement, Exhibit 1 to the contract, Exhibit F to the bill of complaint, is a suit against the respondent bank which by its contract with the receiver undertook to liquidate through trustees appointed by it, more than $1,000,000.00 of face value of assets turned over to it by the receiver and to distribute the proceeds of such liquidation, first to creditors signing the creditors' agreement and thereafter as to any excess remaining, to the shareholders of the old bank, in which liability is sought to be predicated of contracts which constituted respondent a statutory agent of shareholders.

AUTHORITIES SUBMITTED

The proposition that this suit arises under the laws of the United States is sustained by the following authorities:

It has long been established that any suit by or against a national bank involves a federal question. The decisions of the United States Supreme Court are based upon unanswerable grounds, stated in language pertinent to the present case.

Chief Justice Marshall, in *Osborn v. United States Bank,* 9 Wheaton 738, lays down the fundamental principles applying to a national bank, as follows:

> "The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?
>
> "Take the case of a contract, which is put as the strongest against the bank.
>
> * * * * * * * * * * *
>
> "The appellants say, that the case arises on the contract; but the validity of the contract depends on a law of the United States, and the plaintiff is compelled, in every case, to show its validity. The case arises emphatically under the law. The act of congress is its foundation. The contract could never have been made, but under the authority of that act. The act itself is the first ingredient in

the case, is its origin, is that from which every other part arises. That other questions may also arise, as the execution of the contract, or its performance, cannot change the case, or give it any other origin than the charter of incorporation. The action still originates in, and is sustained by, that charter."

This decision has never been modified or reversed, and its reasoning has never been questioned. It has frequently been cited and its language quoted with approval. It is still the established doctrine of the Supreme Court that any suit by or against any national bank arises under the statutes of the United States. The effect of incorporation under the National Banking Act as stated by Mr. Justice Field, fully and strongly substantiates and justifies the foregoing statement.

"* * * We consider that act as constituting by itself a complete system for the establishment and government of national banks, prescribing the manner in which they may be formed, the amount of circulating notes they may issue, the security to be furnished for the redemption of those in circulation; their obligations as depositaries of public moneys, and as such to furnish security for the deposits, and designating the consequences of their failure to redeem their notes, their liability to be placed in the hands of a receiver, and the manner, in such event, in which their affairs shall be wound up, their circulating notes redeemed, and other debts paid or their property applied towards such payment. Everything essential to the formation of the banks, the issue, security, and redemption of their notes, the winding up of the institutions, and the distribution of their effects, are fully provided for, as in a separate code by itself, neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates."

Cook County National Bank v. United States, 107 U. S. 445, 448.

The first restriction on the jurisdiction of federal courts over controversies involving national banks was the act of July 12, 1882, Chapter 290, Section 4, the purport of which is indicated in the decision of Mr. Justice Van Devanter, in *Bankers Trust Company v. Railroad Company,* 241 U. S. 295, 36 S. Ct. 569. After quoting from *Osborn v. Bank,* he says:

> "After the act of March 3, 1875, extended the jurisdiction of the circuit courts to cases arising under the laws of the United States, the ruling just quoted was uniformly followed and applied in suits by and against federal corporations (cases cited), save where the particular suit was withdrawn or excluded from that jurisdiction by some specific enactment, like that of July 12, 1882, Chap. 290, Sec. 4, 22, Stat. at L. 162, Comp. Stat. 1913, Sec. 9665, placing *most* of the suits by and against national banks in the same category with suits by and against banks not organized under the laws of the United States."

The act of July 12, 1882, was repealed, as to any inconsistent provisions, by the act of March 3, 1887, (Chap. 373, Sec. 4), which was replaced by the corrective act of August 13, 1888 (Chap. 866, Sec. 4). Sec. 4, which is identical in both acts, reads as follows:

> "Sec. 4. That all national banking associations established under laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state.

"The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States, or by direction of any officer thereof, or cases for winding up the affairs of any such bank."

The Judicial Code (Act of March 3, 1911) states the provision in positive form, instead of by exception or proviso, by providing directly in paragraph (16) of Section 24, that the district courts shall have original jurisdiction as follows:

"Sixteenth. Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; * * *"

As the law now stands, a case against a national bank may not be removed from the state to the federal court merely because of the federal question arising out of the federal incorporation of such bank. The Congress did not declare that a suit against a national bank as such was not one arising under the laws of the United States, but simply that the mere fact of the incorporation of a national bank under the federal law would not give a right of removal, there being no other federal question involved.

In other words, even though a national bank is incorporated under federal law, the Congress has declared that district courts shall not have jurisdiction other than such as they would have between individual citizens of the same state. But if suit is brought against an individual citizen of a state and arises under the laws of the United States, that individual may remove it to the district court of the United States under Title 28, U. S. C. A., Section 71, reading as follows:

"Any suit of a civil nature, at law or in equity, *arising under the Constitution or laws of the United States,* or treaties made, or which shall be made under their authority,

of which the district courts of the United States are given original jurisdiction, in any state court may be removed by the defendant or defendants therein to the District Court of the United States for the proper district, etc."

Therefore, a suit against a national bank of a civil nature at law or in equity arising under the constitution or laws of the United States, other than the law incorporating a national bank is removable to the district courts.

The precise question here involved was most admirably and fully discussed by United States District Judge, Honorable Edwin R. Holmes, now a Judge of the Circuit Court of Appeals of the Fifth Circuit, in a Mississippi case— *City of Hattiesburg v. First National Bank*, 8 Fed. Supp. 157, especially at page 168, from which we quote as follows:

"The remaining question is whether this is a suit 'arising under the Constitution and laws of the United States'. That depends upon whether the city necessarily relies upon section 5219 of the Revised Statutes of the United States with amendments thereto (12 USCA Sec. 548), as well as upon section 3138, Mississippi Code of 1930, for authority to make the assessment. If so, there is a federal question which arises on the plaintiff's statement of its case; but if the city may properly state its case without invoking the authority of said federal statute or may properly allege facts from which its right to make the assessment may be inferred as a matter of law, without reference to said federal statute, then there is no federal question which necessarily appears from the plaintiff's own pleading. In other words, there is no dispute that there is a federal question in this case, but the contention of the city is that such a question arises only as a matter of defense or as anticipatory of a defense.

"In *Owensboro National Bank v. Owensboro* (1899), 173 U. S. 664, 19 S. Ct. 537, 43 L. ed. 850, upon writ of error to the Court of Appeals of the State of Kentucky, it was held that a state is wholly without power to levy any tax, direct or indirect, upon national banks, their property, assets, or franchises except when permitted to do so by legislation of Congress; that section 5219 of the Revised Statutes was the measure of the power of states to tax national banks; and that the tax, having been assessed on the franchise or intangible property of the corporation, was not within the purview of the authority conferred by the Act of Congress, and was, therefore, illegal. In its opinion, the Court speaks of said section 5219 as a grant of power to the states, and says that any tax not in conformity to it is void. In undertaking to determine the validity of the Kentucky statutes, which sought to tax the franchises of national banks, the Court analyzed the questions presented thus:

" 'Were the taxes complained or levied upon the bank, its property, or franchise, and, if so, were they legal? is the question which, then, arises on the thres' ld of the case.

" 'Two elements are involved in the determination of this question; that is, the extent of the powr of the respective states to tax national banks, and the ascertainment of the scope and purport of the law by which the taxes complained of were levied.

" 'Early in the history of this government, in cases affecting the Bank of the United States, it was held that an agency, such as that bank was adjudged to be, created for carrying into effect national powers granted by the constitution, was not, in its capital, franchises, and operations, subject to the taxing powers of a state.' *Mc-Culloch v. Maryland*, 4 Wheat. 316 (4 Law Ed. 579), *Os-*

born v. Bank of the United States, 9 Wheat. 738, (6 Law Ed. 204).

"The court stated that the first act providing for the organization of national banks contained no 'grant' of power to the states to tax national banks in any form whatever, but the following year the power was 'granted' to tax the shares of stock in the name of the stockholders.

"It follows that in a proper proceeding to tax the shares or surplus of a national bank a state must rely, first, upon the act of Congress which is the measure of its power, and, second, upon its own legislation which has been enacted in conformity thereto. In this case, it must be concluded from the assessment roll, which is the plaintiff's pleading, that it is attempting to tax the bank in reliance upon the federal statute conferring the right in measured terms so to do. As stated by Chief Justice Taft, in the *Arkansas Road District case,* 257 U. S. 547, 42 S. Ct. 250, 66 L. Ed. 364, the city of Hattiesburg is plaintiff, 'asking the Court to give (it) a judgment confirming the assessments.' The book of assessment and the objections of the taxpayer 'make the pleadings.' The proceedings are in Invitum; the bank is the defendant. From the assessment roll it appears inescapably that the assessment is against a national bank, and from that fact the court takes judicial knowledge that it is a fiscal agency of the United States Government which the city is without power to tax except by special grant, and, therefore, concludes as a matter of law that the city is relying upon the federal statute to sustain its right to make the assessment.

"In matters of removal, the federal courts are not bound by the rules of pleading under state procedure in ascertaining what constitutes a case involving a federal question. Even the abolition of written pleadings and a return of pleadings ore tenus, as at ancient common law,

could not take away the right of removal to a federal court under the Constitution and laws of the United States. Regardless of state practice or procedure, the question, which the federal courts must determine for themselves, is whether the plaintiff asserts a right, the correct decision of which, without anticipating defenses, depends wholly or in part upon the application or construction of the Constitution or laws of the United States. Mere references or absence of reference to a federal statute are not conclusive; but it is sufficient, if from the facts alleged it clearly appears, or reasonably follows as a conclusion of law, that a federal law is necessarily relied upon in good faith by the plaintiff as an essential or integral part of his case."

This case is, as said by Chief Justice Marshall in *Osborn v. Bank,* supra, prevaded, from its origin to its close, by United States Law and United States authority.

See, *Young & Jones v. Hiawatha Gin & Mfg. Co.,* 17 Fed. (2nd) 193, another opinion by District Judge E. R. Holmes.

Auburn Savings Bank v. Hayes, 61 Fed. 911;

Boch v. Perkins, 129 U. S. 628, 29 L. Ed. 314;

National Rockland Bank of Boston v. City of Boston, 296 Fed. 643;

Great Northern Ry. Co. v. Galbreath Cattle Co., 271 U. S. 99, 70 L. Ed. 854;

A. G. S. R. R. Co. v. American Cotton Oil Co., 229 Fed. 11 (Fifth Circuit).

A controversy may be truly said to arise under the laws of the United States in all cases where a law of the United States grants a right of property or of action, and a suit is brought to enforce that right, and also wherever it affirma-

tively appears from plaintiff's pleadings that the correct decision of the case depends on the construction of a law of the United States or that some right, title, privilege or immunity on which the recovery depends will be defeated or sustained by the construction of the law.'

See: *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257;

Little York Gold Washing & Water Co. v. Keyes, 96 U. S. 100, 24 L. Ed. 656;

Starin v. New York, 115 U. S. 248, 6 S. Ct. 28, 29 L. Ed. 388;

Patton v. Brady, 184 U. S. 608, 22 S. Ct. 493, 46 L. Ed. 713;

Germania Ins. Co. v. Wisconsin, 119 U. S. 473, 7 S. Ct. 260, 30 L. Ed. 461;

Ray v. Paulnot (D. C.), 46 Fed. (2d) 677;

Southern Ry. Co. v. Prescott, 240 U. S. 632, 36 S. Ct. 469, 60 L. Ed. 836;

Bellaire, Benwood & Wheeling Ferry Co. v. Interstate Bridge Co., (C. C. A. 4th), 40 Fed. (2d) 323, 326,

In *Richards v. Incorporated Town of Rock Rapids* (Iowa), 33 N. W. 372, the President of a National Bank appeared before the equalization board on behalf of its stockholders and objected to the assessment as being in excess of that placed upon other moneyed capital. The board refused to equalize the amount as demanded. Appeal was taken to the Circuit Court, and there the defendant asked to remove the case to the Federal Court. The petition to remove was in proper form, but was overruled. Judgment was rendered against it, and on appeal to the Supreme Court of Iowa, the Court said:

"It is not denied that the question involved in the case requires the application of the rule of taxation prescribed by Section 5219 of the Revised Statutes of the United States. The controversy, therefore, involved a Federal question. The fact that the laws of the state prescribed the same general rule does not defeat the jurisdiction of the Federal Courts. If this position be correct, a state might, by re-enacting any Federal Statute, take away the jurisdiction of the Federal Courts. The case is clearly removable under the Act of Congress, approved March 3, 1875, the provisions of which we need not here repeat. The parties were before the Court; a controversy existed between them in a proceeding involving a question under the Federal Statute; and we think the order of removal should have been made."

In *Stanley v. Board of Supervisors*, 6 Fed. 561 (Circuit Court) the Court says:

"****this is a suit arising 'under the laws of the United States' within the meaning of the Act of Congress of March 3, 1875, respecting the jurisdiction of Circuit Courts. The action is to enforce a right conferred upon the plaintiff and his assignors by section 5219, of the Revised Statutes of the United States, regarding the taxation of property in the shares of national banking associations." (The nature of the suit is not further disclosed). "As was said by Chief Justice Marshall, 'A case may be truly said to arise under the constitution, or a law of the United States, whenever its correct decision depends upon a construction of either,' (*Cohen v. Virginia*, 6 Wheat. 379); or where the title or right set up by the party may be defeated by one construction of the constitution or the laws of the United States, or sustained by the opposite construction. *Osborn v. Bank of U. S.*, 9 Wheat. 822. The right of the plaintiff depends upon the construction of sec-

tion 5219. If that section is meant to interdict such an assessment as that of which the plaintiff complains, his right is sustained by a construction to such effect, and will be defeated by the opposite construction."

In *Wilkinson v. Walker,* 292 Fed. 395, the Court held it had jurisdiction of the suit because it arose under the laws of the United States, in that it was brought upon a bond given for property released by the bankrupt court to the bankrupt, the Court saying:

> "The United States Court, by reason of the Constitution of the United States and the statutes passed thereunder, had taken over the administration of this estate; therefore it had jurisdiction of the subject-matter. The property of the Walker-Grain Company was in the hands of the bankruptcy court. The court liberated the property to the bankrupt upon its giving an indemnifying or forthcoming bond. These actions, these orders, these proceedings, arose out of and by virtue of and under the laws of the United States, and hence this Court has jurisdiction to try out and determine whether a bond given out of this proceeding shall be liquidated, and, if so, in what amount and to what extent. The bond was executed and given under a "general rule," and a "special order" of a court in bankruptcy." * * *
>
> "The instant case arises directly out of those statutes of the United States which provide the methods for the conservation and distribution of the bankrupt's property."

Crane v. Bucklet, 105 Fed. 401, was a suit on a supersedeas appeal bond from District Court to Circuit Court of Appeals. The Court said:

> "The question for determination is, has this Court jurisdiction of the action? It has been held that such a controversy is one springing out of a suit already determined

in the Federal Court, and is in one sense an offshoot of that (*Seymore v. Construction Co.*, Fed. Cas No. 12,689, 7 Biss. 460); and, further, in the same case, that a supersedeas bond is an indemnity given in pursuance of a law of the United States. The measure of the liability of the party and the rights of both plaintiff and defendant depend upon a law of the United States and a rule of the Supreme Court of the United States (No. 29). 3 Sup. Ct. xiv. It is impossible to take a step in the progress of a suit brought upon such a bond in order to determine the rights of the parties without looking at the law and the rule as the guide of the court, and controlling its judgment in the determination of the case.

In the case of *Spokane Falls & N. R. Company v. Ziegler*, 167 U. S. 65, 42 L. Ed. 79, the Supreme Court of the United States took judicial knowledge that the authority of the territory to legislate in respect to the right of a territorial railroad corporation to enter upon the public lands of the United States was derived from the act of Congress and in upholding the jurisdiction of the federal court said:

> "In his complaint the plaintiff alleged that, on May 1, 1889, he was in possession, as a preemptor under the laws of the United States, of a tract of land containing about 80 acres, and on said date had made all the improvements and had lived on the land a sufficient length of time, and had done all other acts necessary to entitle him to a patent to the same from the United States; that the defendant company, being a corporation of the territory of Washington, on said date entered upon and seized a strip of said land 50 feet in width, and appropriated it for railroad purposes without the consent of the plaintiff, and without having compensated him therefor; and that the entry upon and seizure by the defendant of the land was under and pursuant to the laws of the territory of

Washington authorizing railroad companies to appropriate land for right of way for railroad tracks.

"We have judicial knowledge that the authority of the territory to legislate, in respect to the right of a territorial railroad corporation to enter upon the public lands of the United States, was derived from the act of Congress entitled 'An Act Granting to Railroads the Right of Way through the Public Lands of the United States', approved March 3, 1875 (18 Stat. at L. 482, chap. 152), whereby the right of way through the public lands of the United States was granted to any railroad company duly organized under the laws of any state or territory.

"The plaintiff's complaint therefore discloses the case of a contest between a settler claiming title under the laws of the United States and a railroad company claiming a right under an act of Congress; and of such a case the circuit court for the district of Washington clearly had jurisdiction. *Doolan v. Carr,* 125 U. S. 620 (31: 845); *Cooke v. Avery,* 147 U. S. 375 (37: 209)."

The authority of the territory to legislate in the particular matter before the court in *Spokane Falls & N. R. Company v. Ziegler,* did not arise generally and inherently from the fact that the territory existed as a political subdivision of the United States. Even though a territory with certain general powers as such, it could not have had any authority to grant to a railroad a right to enter upon public lands of the United States except by express permission from Congress. Therefore, the Supreme Court held the right invoked and involved in the suit arose under the laws of the United States.

So here, the right attempted to be vindicated and enforced, to-wit, the right to collect a tax upon the shares of the capital stock of a national bank, existed solely and alone by force of

an act of Congress, as pointed out by the Court of Appeals in the instant case.

In *Swafford v. Templeton,* 185 U. S. 485, 46 L. Ed. 1005, the jurisdiction of the circuit court (now a district court) of the United States, of an action to recover damages from state election officers for their asserted wrongful refusal to permit the plaintiff to vote for a member of the House of Representatives at a national election held in the district where he resided, was upheld as one arising under the Constitution of the United States. Mr. Justice White speaking for the Supreme Court of the United States, cited and followed the case of *Wiley v. Sinkler,* 179 U. S. 58, 45 L. Ed. 84.

We quote from the opinion of Mr. Justice White as follows:

> "It is manifest from the context of the opinion in the case just referred to that the conclusion that the cause was one arising under the Constitution of the United States was predicated on the conception that the action sought the vindication or protection of the right to vote for a member of Congress, a right, as declared in Ex parte Yarbrough, 110 U. S. 655, 28 L. ed. 275, 278. 4 Sup. Ct. Rep. 152, 158, 'fundamentally based upon the Constitution (of the United States), which created the office of member of Congress, and declared it should be elective, and pointed to the means of ascertaining who should be electors.' That is to say, the ruling was that the case was equally one arising under the Constitution or laws of the United States, whether the illegal act complained of arose from a charged violation of some specific provision of the Constitution or laws of the United States, or from the violation of a state law which affected the exercise of the right to vote for a member of Congress, since the Constitution of the United States had adopted, as the qualifications of electors for members of Congress, those pre-

scribed by the state for electors of the most numerous branch of the legislature of the state.

"It results from what has just been said that the court erred in dismissing the action for want of jurisdiction, since the right which it was claimed had been unlawfully invaded was one in the very nature of things arising under the Constitution and laws of the United States, and that this inhered in the very substance of the claim. It is obvious from an inspection of the certificate that the court, in dismissing for want of jurisdiction, was controlled by what it deemed to be the want of merit in the averments which were made in the complaint as to the violation of the Federal right. But as the very nature of the controversy was Federal, and, therefore, jurisdiction existed, whilst the opinion of the court as to the want of merit in the cause of action might have furnished ground for dismissing for that reason, it afforded no sufficient ground for deciding that the action was not one arising under the Constitution and laws of the United States."

In *McGoon v. Northern Pacific Railroad Company*, 204 Fed. 998, a case referred to manifestly with approval, by the Supreme Court in the recent case of *Puerto Rico v. Russell & Company*, 288 U. S. 476, 77 L. Ed. 903, is an excellent review of the authorities on the subject of when a case arises under the laws of the United States so as to give the courts of the United States jurisdiction thereof. The learned Judge in that case, we submit, very aptly said:

"But when the complainant asserts a right created by federal law, it presents a suit which *may properly* turn upon a construction of that law; and such a suit 'arises out of' the law for purposes of federal jurisdiction, notwithstanding the defendent may raise only issues of fact by his answer."

CASES RELIED UPON BY PETITIONER DIFFERENTIATED

The case of *Puerto Rico v. Russell & Company*, 228 U. S. 476, 77 L. Ed. 903, is not in conflict with the decision of the Circuit Court of Appeals. This case is reported, in the lower court, in 60 Fed. (2) 10. In that case the removal was upheld on the theory of diversity of citizenship, as to which the Supreme Court disagreed with the lower court.

The case of *Puerto v. Russell & Company*, supra, did not involve the taxation of shares of stock in a national bank.

The fact that the People of Puerto Rico is a political entity, recognized as such by an act of Congress under which its government is organized, was not deemed sufficient to make a suit brought by it to recover an improvement tax, such as that involved in the case of *Puerto Rico v. Russell & Company*, supra, one arising under the laws of the United States any more than a like suit brought by a state which came into the Union by virtue of an act of Congress. The right to levy the improvement tax was not granted by an act of Congress.

Here, the right to tax at all is specifically created by an act of Congress.

As aptly said by Judge Sibley, in the opinion in this case:

"Section 548 is not a limitation placed by the federal laws upon an antecedent right of the state to tax national banks, so as to be considered only a weapon of defense against such taxation. Both in form and in substance it is a grant of authority to state legislatures to tax such banks, limiting them, however, to one of three forms of taxation" mentioned in the statute.

This case does not involve merely a right to sue, derived from Federal law, as in the case of *Puerto Rico v. Russell & Co.*, supra, nor merely the right to property which was obtained under Federal Statute.

In the instant case, the foundation of the right to tax national bank stock at all, to any one, in any manner, and the right to collect a tax of a receiver of an insolvent national bank and the assets in his hands, is necessarily grounded upon the Acts of Congress, and the controlling question is the interpretation and enforcement of the Federal Statutes in that regard. Such appears upon the face of the petitioner's pleadings.

Nor is there any conflict between the decision of the Circuit Court of Appeals of the Fifth Circuit in the instant case and the opinion of the Supreme Court of the United States in *Shulthis v. McDougal,* 225 U. S. 561, 56 L. Ed. 1205.

In *Shulthis v. McDougal* no question as to the validity of, and enforceability of, a tax against a national bank as against the assets of an insolvent national bank in the hads of a receiver as here, was involved. In *Shulthis v. McDougal* there was merely a controversy over rights and titles in and to lands originally allotted to the Creek Nation under Acts of Congress. In other words, under various statutes of the United States, certain lands had been alloted in severalty to the Creek Nation and provision had been made as to their leasing and alienation after allotment. True, as pointed out by the Court, there was enough in the bill of complaint to indicate that those statutes constituted the source of the complainant's title or right originally to the land involved, and that the defendants were claiming the land, or certain rights thereunder adversely to the complainant. But under the allegations of the bill, it did not appear as here, that the complainant necessarily relied upon the laws of the United States. Not only was there no mention made of certain statutes relating to the allotments to the Creek Nation and the laws as to the alienation of such lands, but there was nothing to show that any controversy respecting their validity, construction or effect was involved and as pointed out by the Court, such did not appear "by necessary implication." The Supreme Court of the United States, also pointed out that nature of the

controversy between the complainant and his opponent was unstated and uncertain and could have arisen in different ways "wholly independent from the source from which his title or right was derived." In addition thereto, the Court expressly held that the corporation there being sued was not a Federal but a state corporation.

Here, it clearly appears upon the face of the petitioner's own pleadings that in order to hold respondent under its contract with the receiver of the old bank, it was necessary for petitioner to show that the tax claimed was laid in conformity to, and valid under, the laws of the United States and that the claimed liability of the old bank therefor was one that was enforceable against the receiver of the old bank and the assets in its hands after insolvency. The determination of such questions necessarily involved the construction, effect and applicability of the laws of the United States as applied to the facts. Indeed, the case could not be decided by any court without construing and applying the Federal statutes.

The case of *Shoshone Mining Company v. Rutter,* 177 U. S. 505, 44 L. ed. 865, is clearly distinguishable from the case at bar. That suit merely involved an issue as to the right to possession of property, the title to which had been derived from the United States. It was a mining claim. It is true that authority to bring an action to determine the right of possession had been conferred by an act of Congress, but that act authorized the action to be brought in any court of competent jurisdiction. It did not create the right to possession and furthermore, the statute there construed expressly provided that the right of possession might be determined by "local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States" or "by the statute of limitations for mining claims of the state or territory where the same may be situated." It was held by the Supreme Court that a suit with reference to

possession of such lands may not involve any question under the Constitution or the laws of the United States but simply a determination of local rules or customs or state statutes or even only a mere matter of fact. Mr. Justice Brewer very aptly drew a distinction between a statute authorizing an action to establish a right and one which created the right to be established, saying:

> "A statute authorizing an action to establish a right is very different from one which creates a right to be established. An action brought under the one may involve no controversy as to the scope and effect of the statute, while in the other case, it necessarily involves such a controversy, for the thing to be decided is the extent of the right given by the statute."

This case of *Shoshone v. Rutter,* supra, is very aptly distinguished from cases of the type of the one at bar, in the opinion of the court in *McGoon v. Northern Pacific Railroad Company,* 204 Fed. 998, cited supra, from which we quote as follows:

> "*Shoshone Mining Co. v. Rutter,* 177 U. S. 505, 20 Sup. Ct. 726, 44 L. Ed 864, is a leading authority on this subject. It was an adverse suit to determine the right of possession to a mining claim. The suit was authorized by section 2326 of the Revised Statutes (U. S. Comp. St. 1901, p. 1430), but the right which it was to determine was not created by federal law. On the contrary, that right was dependent upon state statutes, and the local customs and rules of miners in the several mining districts. Because the right was not created by federal law, it was held that the case was not a suit arising under a law of the United States. The case, as Mr. Justice Brewer says, is a close one. In pointing out the distinction which determined the decision, the learned justice uses the following

accurate language (177 U. S. at page 510, 20 Sup. Ct. at page 728, 44 L. Ed. 864):

"'A statute authorizing an action to establish a right is very different from one which creates a right to be established. An action brought under the one may involve no controversy as to the scope and effect of the statute, while in the other case it necessarily involves such a controversy, for the thing to be decided is the extent of the right given by the statute.'

"The whole reasoning of the opinion shows clearly that, if the right of possession which the suit was brought to determine had been created by federal law, the case would then have been a suit arising under a law of the United States."

The case of *American Well Works Company v. Layne & Bowler Company et al.*, 241 U. S. 257, 60 L. ed. 987, does not militate against our contention here. That was a suit for damages for libel and slander by statements to various persons that the plaintiff was infringing a patent to the defendant and that the defendant would sue both the seller and the buyer if the plaintiff's pumps were used. The majority of the Supreme Court held that the case arose under the law of the state. Justice McKenna dissented. However, in that case, the court held that it was immaterial whether or not the plaintiff's business which he claimed had been damaged, was built up by patents or without and that it was no part of plaintiff's case to prove anything concerning defendant's patents or that the plaintiff did or did not infringe the same, and still less to prove anything concerning patents of his own. A suit for damages to business caused by a threat to sue under the patent law was held not to be itself a suit under the patent law. The decision recognized the principle that a suit arises under the law that creates the cause of action.

So here, the law that gave the right sought to be vindicated in the instant case, was a law of the United States, and as a condition precedent to the enforcement of the right, petitioner necessarily invoked the law of the United States out of which the right arose and by his suit, necessarily was required to establish that the claimed right existed under that law. Whether he referred to it or not eo nomine, he set forth a state of facts pertaining to the assessment and thereon asserted the existence of his right, contending that those facts showed a valid tax which could not be true unless the facts showed compliance with the law of the United States. The petitioner's right could neither be vindicated, nor enforced without reference to the law of the United States that created it.

It would hardly seem necessary to refer to counsel's reference to the dissenting opinion in *Smith v. Kansas City Title & Trust Company*, 225 U. S. 180, 65 L. ed. 577. The majority opinion sustains respondent's contention. Justice Holmes' dissent recognizes the principle that the suit arises under law that created the cause of action.

Here, the state law derives its force from the authority of the law of the United States and any procedure whatever with reference to the enforcement of the taxes must conform primarily to the law of the United States.

The case of *Minnesota v. Northern Securities Company et al.*, 194 U. S. 48, 48 L. ed. 870, was an effort by the state of Minnesota to enforce its own statutes against trusts and combines. We submit nothing therein militates against the contention of the respondent here.

The case of *Great Northern Railway v. Alexander*, 246 U. S., 276, 62 L. Ed. 713, is not an authority against respondent here. That case merely held that a suit under the Federal Employers Liability Act which was begun in the State Court by the plaintiff and did not become removable in the absence of

any claim that there was a false attempt to evade the removal merely because in developing the case the plaintiff may have failed to prove the allegation in his declaration that the deceased and the railroad were both employed in interstate commerce at the time of injury.

The case of *Carson v. Dunham*, 121 U. S. 421, 30 L. Ed. 992, is no authority against the position of the respondent here. That was merely a case where the plaintiff sought to foreclose a mortgage assigned to him by certain parties. Mrs. Carson was made a party on the theory that she was in possession of the mortgaged property and that she and plaintiff were the only necessary parties to the suit. Mrs. Carson removed the case into the United States Court, and in her petition for removal sought to raise the Federal question. There was nothing in the plaintiff's pleadings that showed a case arising under any law of the United States. That contention was offered defensively. Furthermore, the defendant in seeking to raise the Federal question merely planted herself upon the position that the property of which she was in possession had been previously adjudged to her by the Circuit Court of the United States for the District of South Carolina. In other words, she merely claimed, on that feature of the case, that the District Court of the United States had established her title to the property. That contention was held not to be sufficient to show that the cause arose under the laws of the United States. The case of *Providence Savings Co. v. Ford*, 114 U. S. 635, referred to in the decision by the Supreme Court of the United States, held that a suit on a judgment rendered in favor of a party in a Federal Coourt is but the assertion of an ordinary right, unless some question is raised distinctly involving the laws of the United States.

In the instant case, however, as we have hereinabove pointed out, the facts pleaded by the petitioner affirmatively and clearly show that the controversy distinctly involves the laws of the

United States, and that the petitioner necessarily must and does rely thereon.

The case of *Fourth National Bank v. City of Boston,* 300 Fed. 29, is not applicable here, nor is it sound authority against respondent's position. That was a suit by a National Bank against the City of Boston, in which the Court held that the bill was not good as one giving jurisdiction to the Federal Court where the bank, suing to recover taxes, only alleged that the authorities of the defendant City, "purporting to act under a state statute, assessed a tax on such shares at a greater rate than was assessed on moneyed capital in the hands of individual citizens of that state, that the tax was assessed and collected without warrant of law and contrary to the provisions of the statutes and laws of the United States was too uncertain and ambiguous and did not clearly present a Federal question." Manifestly, the decision is not controlling here, for the reason that it has been repeatedly held since then and by the Supreme Court of the United States, that the Courts of the United States do have jurisdiction of bills filed by national banks on behalf of the shareholders to recover taxes paid on the ground that the state taxing laws discriminated against the shares of national banks, and in favor of other moneyed capital employed in competition therewith. See the following:

Calloway v. Bohler (D.C. Ga) 291 Fed. 245, approved 297 U. S. 479., 69 L. Ed 745.

Charleston National Bank v. Mellon, 171 Fed. 743.

There is nothing in the case of *Neely v. Planters National Bank of Clarksdale,* 48 Fed. (2) 266, that militates against the position of the respondent here. There was no suit in that case involving any points or contentions such as are presented in the one at bar. The same District Judge, Hon. E. R. Holmes, decided this case that decided, in a very able opinion, the case of *Hattiesburg v. First National Bank of Hattiesburg,* 8 Fed.

Supp. 157, which we have cited at another place in our brief. A mere casual inspection of the case will indicate that it has no application here. Neely brought his suit against the bank, before the appointment of a receiver, about a matter of purely private contract between him and the bank in no way involving any law of the United States. The Court merely held that the fact the National Banking Association had been sued in the State Court did not give ground for removal to the United States Courts.

Nor is this case like unto the case of *Moulton v. National Farmers Bank,* 27 Fed (2), 403.

The case of *In Re Winn,* 213 U. S. 458, 58 L. ed. 873, is distinguishable from the case at bar in that the cause of action there brought was not, as said by the Supreme Court, "based upon the interstate commerce law or upon any other law of the United States."

In that case, it appeared:

> "The petitioner as assignee of the right of action of a shipper, brought, in a state court of Iowa, an action at law against the American Express Company for the negligent transportation of a boar, whereby the animal was killed, to the damage, it was alleged, to the owner of $8,000. The transportation was under a written contract between the owner and the defendant, which was annexed to the declaration as an exhibit. The shipment was from a point in Iowa to a point in Nebraska."

The Court followed the case of *Louisville & Nashville Railroad Company v. Mottley,* 211 U. S. 149, 53 L. ed. 126. *Louisville & Nashville Railroad Company v. Mottley* was a suit begun in a state court to compel the specific performance by a carrier of its agreement to issue free passes annually to the complainants. The suit was predicated on the contract. It was not based upon a law of the United States. The court held that the case was

not made removable because the plaintiff anticipated in his pleadings the defense that the carrier would make to the suit by alleging unnecessarily that the defendant was basing its refusal to comply with its contract upon an act of Congress. The Supreme Court of the United States held in line with the generally accepted rule, that a suit arises under the Constitution and laws of the United States within the removal statutes only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that constitution.

It is clear from the decisions of the cases of *In Re Winn* and *Louisville & Nashville Railroad Company v. Mottley,* supra. that had the suits been based upon a right granted by an act of Congress upon which the plaintiffs must necessarily rely, the suits would have arisen under the laws of the United States.

Nor is the case of *Guthrie v. Harkness,* 199 U. S. 48, 50 L. ed. 130, applicable here. In that case, the suit was clearly one to enforce the common law right of a stockholder for proper purposes and under reasonable regulations as to place and time, to inspect the books of a corporation of which he is a member. This common law right had not been granted by an act of Congress, nor had any law of Congress restricted its exercise.

The case of *Schuyler National Bank v. Bollong,* 150 U. S. 85. 37 L. ed. 1008, does not deal with any question of removal, nor with the proposition as to when a cause arises under the laws of the United States. The case was tried out in the state court of Nebraska and affirmed by the state supreme court and reached the Supreme Court of the United States by writ of error.

The Supreme Court of the United States in dismissing the writ of error said:

> "The questions raised upon the pleadings, were disposed of by the supreme court in accordance with these provisions and the jurisprudence of the state in that re-

gard, and there is nothing whatever to indicate that in passing upon the technical sufficiency of the complaint its attention was invited to the proposition that by its judgment thereon it might be depriving the defendant below of some title, right, privilege, or immunity arising in virtue of the sections under which the liability accrued."

The petitioner has cited decisions announcing the rule that, for a suit to be removable to a Federal Court upon the ground that it is one arising under the Constitution and laws of the United States, it must so appear from the plaintiff's statement of the case in his pleadings, and not from any defense interposed by the defendant. But none of these cases controvert the rule laid down in the case of *City of Hattiesburg v. First National Bank,* 8 Fed. Supp. 157, and other cases cited by us, that the question as to whether a suit is one arising under the Constitution and laws of the United States does not always depend upon whether or not the plaintiff has specifically cited and relied upon a law of the United States in the statement of his cause; but, rather, upon whether or not the plaintiff must rely upon a law of the United States.

None of the cases cited by petitioner controvert the proposition that the very nature of the case may determine whether or not it arises under the Constitution and laws of the United States, notwithstanding the petitioner has failed to expressly refer to them.

For instance, the leading case of *State of Tennessee v. Union & Planters Bank,* 152 U. S., 453, cited and quoted at length by the petitioner, does hold that for a case to be removable as a suit arising under the Constitution and laws of the United States, it must so appear in the plaintiff's statement of his claim; but the language of the opinion does not justify the conclusion that the plaintiff must have expressly declared upon a law of the United States in order to make the case removable.

For instance, the Court says (p. 419) quoting Chief Justice Marshall:

> " . . . and when a question to which the judicial power of the Union is extended by the Constitution forms an *ingredient of the original cause* it is in the power of Congress to give the Circuit Court jurisdiction of that cause, although other questions of fact or of law may be involved in it. . . "

The Court Says further:

> "The question which the case involves, then" (meaning at that time) "must determine its character, whether those questions be made in the cause or not."

And, further, (page 460):

> "The question whether a party claims a right under the Constitution or laws of the United States is to be ascertained by the legal construction of its own allegations."

We submit that, as held in the cases cited by us, Section 5219 of Revised Statutes, was of necessity an ingredient of the petitioner's case, and that the very character of the suit brought by petitioner made it a suit arising under the laws of the United States.

In *Tennessee v. Union & Planters Bank*, supra, the Court was emphasizing the rule that it was not sufficient that the Federal question upon which the cause depends was first presented by the answer or plea of the defendant.

The Federal question in that case was presented by the answer of the defendant that defendant banks were exempt from taxation upon their shares of capital stock, by virtue of their charters, and that the general revenue or taxing law of the State of Tennessee, under which the assessments were made, was in violation of that clause of the Constitution of the United States, which forbids a State to pass any law impairing the obligation of a contract.

PETITIONER ESTOPPED BY AMENDMENT AFTER MOTION TO REMAND OVERRULED

Petitioner is estopped to contend that he did not rely upon the laws of the United States for the reason that after the District Court of the United States had overruled the motion to remand and had heard the motion to dismiss and announced orally his conclusion that the motion to dismiss the bill should be sustained, petitioner presented a motion for leave to amend the seventh, eighth, twenty-first and forty-third paragraphs of the original bill so as to aver that the liability of the shareholders of the old bank to taxation in the instant case was pursuant to the laws of the State of Mississippi "and the laws of the United States," and that the old bank was required to make the returns that it is alleged it did make by the "laws of the State of Mississippi and of the United States" (Transcript, p. 78).

The motion to amend contains other matter, but at this point, we direct particular attention to that feature of it which expressly invokes the laws of the United States to establish the validity of the assessment and tax. Numerous objections to the allowance of this amendment were filed by the respondent, the new bank, which will be found, beginning at the bottom of page 80 of the Transcript. We refer at this point, however, to only one of those grounds of objections to the allowance of the amendment, which will be found, Transcript, page 82, and reads as follows:

> "7. It would be futile to grant the plaintiff's motion to allow the proposed amendments to the bill of complaint, because of the fact that if the said amendments to the bill be made, still the bill as amended would state no cause of action against this defendant, and would still be subject to the same objections as were made to the original bill in this defendant's motion to dismiss the same."

It will be noted from the final decree in the lower court, (Transcript, p. 84), that the District Court was of the opinion that the quoted ground of objection to the amendment was good, and in passing thereon, ordered the proposed amendment and the objections thereto made a part of the record and found and declared with reference thereto as follows:

> "* * * that the proposed amendments, if allowed, neither change in any material way the legal effect of the original bill, nor cure the defects therein; that considering the bill as amended by the proposed amendments, the Court is of the opinion, that the assessments relied on are not the equivalent of a tax on the shareholders, are wholly void, contrary to the laws of the United States and of the State of Mississippi, beyond the power of such taxing authorities and unenforceable."

It appears, therefore, that the court in passing on the motion to dismiss, treated the bill as amended by the proposed amendments and held the alleged tax here sued for, to be based upon an assessment that was wholly void and contrary to the laws of the United States and of the State of Mississippi.

See the case of *Henderson v. Maryland Casualty Company*, (Fifth Circuit), 62 Fed. (2) 107. In that case the plaintiff being entitled to a weekly wage of $16.95 which in the aggregate for the total weeks sued for, amounted to $3661.20, averred in his petition, wishing to avoid removal to the Federal court, a weekly wage of only $13.50, and on the face of his pleading sought to recover only $2916.00. The defendant on the petition averring the true wage and that more than $3000.00 was involved, removed the case to the District Court of the United States. The plaintiff there asked that it be remanded to the state court. But when the motion to remand was overruled, plaintiff then amended in the District Court and sought recovery for the true wage and a total of $3661.20. Speaking to the point, Judge Sibley for the court, said:

"This amendment we think waived and cured any error that may have been made in refusing the remand. The controversy really was one within the jurisdiction of the District Court, and the pleadings thereafter showed it. The plaintiffs thenceforward were invoking the court's jurisdiction to recover $3661.20. While asserting this claim, they could no longer maintain the inconsistent position that only $2,916 was involved. They are estopped to do so. Compare *New Lamp Chimney Co. v. Brass & Copper Co.*, 91 U. S. at page 659, 23 L. Ed. 336; *Davis v. Wakelee*, 156 U. S. 681, 15 S. Ct. 555, 39 L. Ed. 578."

We contend that the bill as originally drawn from the facts therein averred affirmatively and clearly showed reliance upon the laws of the United States; and that not only is this true, but that by the proposed amendment which the District Court treated as having been made, in sustaining the motion to dismiss, the petitioner admitted and conceded of record that he was relying upon the laws of the United States.

OTHER LAWS OF THE UNITED STATES RELIED ON BY PETITIONER AND ANSWER TO PETITIONER'S POINT 2

It is further apparent from the pleadings of the petitioner that affirmative reliance was necessarily based not only on Section 5219 of the Revised Statutes, 12 USCA, Section 548, to establish the validity of the claimed tax, but upon the laws of the United States with reference to the winding up of insolvent banks and distribution of the assets of an insolvent bank pursuant to the authority and consent of the Comptroller of the Currency and under laws of the United States. See, 12 USCA, Sections 191, 192, 193, 196, 197 and 198.

Though the Circuit Court of Appeals stated in the opinion that it did not conceive that the suit was one for the winding up of, and the liquidation of, the affairs of an insolvent national

bank, this was said after the court had reached the conclusion that jurisdiction was amply sustained on the ground that the suit was one arising under the laws of the United States. We respectfully submit that the jurisdiction of the District Court of the United States was rightly upheld by the Court of Appeals on the ground that the suit was one necessarily arising under the laws of the United States; but, further that if it were necessary to do so, jurisdiction can be upheld on the ground that the suit is one, the manifest purpose of which on the face of the petitioner's own pleadings, is further winding up of, and liquidation of, the affairs of an insolvent national bank within the meaning of Paragraph 16 of Section 41 of the Judicial Code.

The most recent decision on the jurisdiction of the courts of the United States of cases for winding up the affairs of a national banking association is that of *Lawrence National Bank v. Rice et al.*, decided by the Court of Appeals for the Tenth Circuit. It is twice reported. On the merits the case is reported in 82 Fed. (2) 28. On application for rehearing, the court considered the jurisdictional question and upheld the jurisdiction of the United States District Court, *Lawrence National Bank v. Rice et al.*, 83 Fed. (2) 642. The suit was by a liquidating committee of a national bank which had voluntarily dissolved to determine whether or not the bank had barred its creditors by voluntary dissolution and to construe the contract whereby liabilities were assumed by another bank. In holding the suit was one for winding up the affairs of a national bank, the court said:

> "We are also warned that if jurisdiction be here sustained, a liquidating bank or its committee may sue on every ten dollar note of the bank, as can a receiver of a bank which is in process of involuntary liquidation. The conclusion does not follow. This suit is brought to determine whether the Watkins Bank had barred its creditors by voluntary dissolution and the publication of notices in accord

with federal statutes, and to construe the contract by which its liabilities were assumed by the Lawrence Bank. The case is bottomed upon a right given by a federal statute and to construe the contract by which its affairs were wound up. That contract is the very heart of the winding up of the affairs of the Watkins Bank. A case involving its construction is one therefore 'for winding up the affairs' of a national bank. But if the conclusion does follow, upon which we express no opinion, and if a bank in voluntary liquidation should be placed on a different footing from one in involuntary liquidation, as appellees urge, it is a matter for Congress and not the courts. We conclude the jurisdiction exists."

See, *Citizens National Bank in Waxahachie v. Citizens National Bank of Waxahachie et al.*, 9 Fed. Supp. 513.

The action here involved is, in legal effect, of the same nature as a suit to establish a claim against the receiver of the insolvent First National Bank *of* Meridian, and is against an agent designated by the receiver and the shareholders of the old bank to complete its liquidation, whereunder it is claimed the specific alleged debt was provided for though not in express terms.

As stated by the Court in *Guaranty Company v. Hanway*, 104 Fed. 369, 44 C. C. A. 312:

"An action by or against a receiver of a national bank, appointed under this Act, is an action arising under the laws of the United States, because the Act of Congress creates his office, grants his rights and powers, and imposes his duties. In the absence of this act there would be no such receiver, and no suits against him could arise. Every action by or against him necessarily involves the exercise of some of his rights, or the proper discharge of some of his duties, and invokes a consideration of the

proper construction and effect of the laws of the United States from which he derives them. For these reasons, in contemplation of law every action by or against him arises under the laws of the United States. *McDonald v. Nebraska* (C. A. A.), 101, Fed 171, 172; *Auten v. Bank*, 174 U. S. 125, 19 Sup. Ct. 628, 43 L. Ed. 920; *In re Chetwood*, 165 U. S. 458, 459, 17 Sup. Ct. 385, 41 L. Ed. 782; *Armstrong v. Trautman* (C. C.) 36 Fed. 275; *Grant v. Bank* (C. C.) 47 Fed. 673.

"The same reasons bring actions by or against a shareholder's agent under the same rule."

The court said further:

"This is clearly a case for winding up the affairs of such a bank. It is a suit to take $4,000.00 from the fund realized from the collection and sale of the assets of the National Bank of North Dakota in the process of winding up its affairs under the Act of Congress, and to pay it to the plaintiff instead of permitting it to be distributed to the shareholders.

" * * * it is the nature of the action, and not the possibility of maintaining it that determines whether or not a case arises under the laws of the United States. If the case presents a question, or may present a question, to be determined by those laws and the acts of the parties under them, it arises under the laws of the United States, which ever way the question ought to be determined * * * *

"Upon the questions presented by this claim, he was entitled to a hearing and a decision, and that decision could not be reached without a consideration of the provisions of the Act of Congress under which the defendant was appointed, and the effect of his acts thereunder. The case, therefore, arose under the laws of the United States, even

if a proper decision of that question would have defeated the plaintiff."

The case of *International Trust Co. v. Weeks,* 203 U. S. 364, 51 L. Ed. 224, was an action on a contract brought in the Circuit Court of the United States for rent alleged to be due under the terms of the lease made by Henry Parkman et al. to Broadway National Bank. The defendant was agent of the shareholders of Broadway National Bank. The Court said, among other things:

> "1. It is objected by the defendant in error that the Circuit Court had no jurisdiction of this case. We think otherwise. The action was clearly one to wind up the affairs of the bank"—citing *In re Chetwood,* 165 U. S. 443, and *Guarantee Company v. Hanway,* 104 Fed. 369, 44 C. C. A. 312.

In the case at bar, the respondent, First National Bank *in* Meridian is manifestly sued on the theory that it stands in the place of the receiver of the insolvent First National Bank *of* Meridian, under and by virtue of the contract filed as an exhibit to the bill.

It will be noted that in those cases against the receiver of an insolvent national bank, or against the agent of the shareholders, it was not considered material, in determining that the case was one arising under the laws of the United States, for the plaintiff to make specific reference to the particular statute under which the receiver was acting; but the mere fact that the suit was against a receiver of an insolvent National Bank, or against the agent of the shareholders of an insolvent national bank, or to recover a tax assessed against a national bank, was sufficient to characterize it as a suit arising under the laws of the United States.

It is sufficient that the plaintiff shall have averred facts which bring the case within the control of the Federal statute.

Bell v. Kelly, 54 Fed. (2d) 395.

This was a suit in which plaintiff sought to establish a prior claim as to certain of the assets of an insolvent bank which had passed to a third party and which the plaintiff claimed had been wrongfully transferred to a third party. The suit was brought against the receiver and the third party. On the question of jurisdiction the Court said:

> "The determination of the controverted questions involved and relate to the conduct of the insolvent bank's business, the disposition of certain of its assets and the respective priorities of the receiver, the plaintiff and other persons claiming interest in or title to certain of the assets. Such a suit must be held to be within the category of suits for winding up the affairs of an insolvent banking association."

The Court sustained its jurisdiction of the case as being a suit for winding up the affairs of a national banking association.

Chabot v. McRae, 7 Fed. Supp. 113.

This was a suit in which three trustees of an insolvent national bank were substituted as plaintiff to recover upon assets which had been transferred by the board of directors to the trustees, in pursuance of the plan provided by the Comptroller of the Currency, under authority of Section 207, Title 12, U. S. C. A., to be liquidated for the benefit of unsecured creditors of the bank. On the question of jurisdiction, the Court said:

> "Even if it be assumed that such trustees are not officers of the United States—(as in cases of similar but not entirely analogous character receivers and agents have been frequently held to be)—citing authorities, there can be no

escape from the conclusion that it is a case of winding up the affairs of a national banking association, within the meaning of subdivision 16 of Section 41, Title 28, U. S. C. A."

The jurisdiction of the case was upheld as a case for winding up the affairs of a national bank.

Another Federal question arising under the laws of the United States presented by the bill is this:

The bill alleges (Transcript, pp. 10-11) Paragraphs 39-41, that the defendant bank assumed and undertook to discharge all liabilities of every kind *imposed by statute* upon the shareholders of the insolvent First National Bank *of* Meridian by reason of their ownership of said shares, among which liabilities was and is the liability to pay all taxes as set out in the bill.

Since the liability of a shareholder, as alleged in the bill, is imposed by statute—that is to say, by the statutes of the United States, particularly Sections 5151 and 5234, Revised Statutes (Sections 63, 64 and 192, Title 12, U. S. C. A.), the question as to whether or not the shareholders' liability extends to the payment of the taxes in question is to be determined by the application and construction of the statutes of the United States.

The personal liability of a stockholder in a national banking association is statutory,—*Kennedy v. Gibson,* 75 U. S. 498. 19 L. Ed. 347—and cannot be controlled or limited by state statutes. *Rankin v. Barton,* 199 U. S. 228, 50 L. Ed. 163.

CONCLUSION

We respectfully submit that the following propositions are clearly deducible from the authorities cited, and are sound:

1. That in order to sustain the jurisdiction of the United States District Court, on the ground that the suit is one arising under the Constitution and Laws of the United States, such must affirmatively appear from the pleadings of the petitioner.

2. The pleadings of the petitioner need not necessarily expressly refer either to the Constitution or the laws of the United States. It sufficiently and affirmatively appears on the petitioner's pleadings that the suit arises under the Constitution and laws of the United States, whenever, on a proper analysis of those pleadings, it is apparent that the constitution or laws of the United States are a necessary ingredient of petitioner's cause of action, and inhere in it; or that the suit is for the vindication, protection or enforcement of a right, fundamentally based on the Constitution or laws of the United States,—a right granted or created thereby.

3. That there is a clear distinction between those cases where the Act of Congress merely gives a right to sue, but does not grant or create the right, of which:

Puerto Rico v. Russell & Co., 288 U. S. 476, 77 L. Ed. 903, and

Shoshone Mining Co. v. Rutter, 177 U. S. 505, 44 L. Ed 865 are types; and those cases where the Act of Congress creates or grants the right which the plaintiffs assert and seek to vindicate and enforce, of which this case, and:

City of Hattiesburg v. First National Bank of Hattiesburg, 8 Fed. Supp., 157;

Swafford v. Templeton, 185 U. S. 485, 46 L. Ed, 1005;

Wiley v. Sinkler, 179 U. S. 58, 45 L. Ed. 84; and

Domenech v. National City Bank, 294 U. S. 199, 79 L. Ed 857 are types.

In presenting and arguing this case, petitioner has, as we submit in all deference, failed to note the line of demarcation between the two classes of cases.

4. That the case at bar is clearly one in which, on the face of petitioner's own pleading, when properly analyzed and understood, the right asserted and sought to be vindicated and enforced, is one granted and created by the laws of Congress, which are a necessary ingredient of the petitioner's case, and, without reliance on which, the suit could not possibly be maintained.

5. That not only is this true, but that petitioner, after the motion to remand was overruled, presented amendments to the original bill of complaint, expressly invoking the laws of Congress. which amendments, though denied, were treated by the District Court as made, in passing on the motion of respondent to dismiss the original bill; and that thereby petitioner estopped himself to contend that his pleadings did not, on their face, invoke the laws of the United States as an essential ingredient in the asserted right to recover:

Henderson v. Maryland Casualty Co., 62 Fed (2) 107

6. That it appears on the face of petitioner's pleadings that the suit is one for the winding up of an insolvent national bank under Paragraph 16, Section 41, Title 28, U. S. C. A.:

Citizens National Bank in Waxahachie v. Citizens National of Waxahachie, 9 Fed. Supp. 513;

Lawrence Nat'l Bank v. Rice, 83 Fed (2) (10th Ct) 642.

7. That the suit is in effect one against an agent designated by the Receiver and shareholders of the old bank to complete its liquidation.

International Trust Company v. Weeks, 203 U. S. 364, 51 L. Ed 224

8. That this case is pervaded from its origin to its close by United States law and United States authority; and that, in affirming the decision of the lower Court, the Court of Appeals of the Fifth Circuit, rightly construed petitioner's pleadings in accordance with those laws, and determined against the petitioner's claim that it could not be maintained:

(a) Because the assessments of the taxes were void as contravening section 5219 Revised Statutes of the United States, Title 12, U. S. C. A., Section 548:

First National Bank of Gulfport v. Adam, 258 U. S. 363, 66 L. Ed. 661.

(b) That after the insolvency of the old bank, its Receiver (and, necessarily, the purchaser of the assets from the Receiver) could not be required to pay the tax here sought to be enforced:

Stapylton v. Thaggard, 91 Fed. 93

City of Boston v. Beal, 51 Fed. 306, affirmed 55 Fed. 26

Brown v. French, 80 Fed. 166

We respectfully insist that the jurisdiction of the District Court of the United States for the Eastern Division of the Southern District of Mississippi, is clear; and that the case should be affirmed.

Respectfully submitted,

A. S. BOZEMAN and

R. E. WILBOURN

Attorneys for Respondent

I, the undersigned, R. E. Wilbourn, hereby certify that I have this day delivered to Hon. J. C. Floyd, Attorney for Petitioner, at his office at Meridian, Mississippi, a true and correct copy of the foregoing brief on behalf of respondent.

This the.....day of October, A. D., 1936.

.....

Of Counsel for Respondent

SUPREME COURT OF THE UNITED STATES.

No. 29.—October Term, 1936.

James B. Gully, State Tax Collector for the State of Mississippi, Petitioner,
vs.
First National Bank in Meridian, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[November 9, 1936.]

Mr. Justice Cardozo delivered the opinion of the Court.

Whether a federal court has jurisdiction of this suit as one arising under the Constitution and laws of the United States is the single question here.

Petitioner, plaintiff in the court below, sued the respondent in a state court in Mississippi to recover a money judgment. The following facts appear on the face of the complaint: In June, 1931, the assets of the First National Bank *of* Meridian, a national banking association, were conveyed to the respondent, the First National Bank *in* Meridian, under a contract whereby the debts and liabilities of the grantor, insolvent at the time and in the hands of a receiver, were assumed by the grantee, which covenanted to pay them. Among the debts and liabilities so assumed were moneys owing to the petitioner, the state Collector of Taxes, or now claimed to be owing to him, for state, county, city, and school district taxes. In form the assessment was imposed upon the shares or capital stock of the bank, its surplus and undivided profits, exclusive of the value of the real estate. In law, so the pleader states, all taxes thus assessed were debts owing by the shareholders, which the bank was under a duty to pay as their agent out of moneys belonging to them, then in its possession. The new bank, in violation of its covenant, failed to pay the taxes of the old bank, which it had thus assumed and made its own. Judgment is demanded for the moneys due under the contract.

A petition was filed by the respondent for the removal of the cause to the federal court upon the ground that the suit was one

arising "under the Constitution or laws of the United States". Judicial Code § 28, 28 U. S. C. § 71; *cf.* Judicial Code § 24 (1) (a), 28 U. S. C. § 41. The state court made an order accordingly, and the federal District Court denied a motion to remand. Later, after a trial upon the merits, the complaint was dismissed. The Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of dismissal, overruling the objection that the cause was one triable in the courts of Mississippi. 81 F. (2d) 502. The decision was put upon the ground that the power to lay a tax upon the shares of national banks has its origin and measure in the provisions of a federal statute (R. S. § 5219, 12 U. S. C. § 548), and that by necessary implication a plaintiff counts upon the statute in suing for the tax. Because of the importance of the ruling, this Court granted certiorari, "limited to the question of the jurisdiction of the District Court".

How and when a case arises "under the Constitution or laws of the United States" has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. *Starin* v. *New York*, 115 U. S. 248, 257; *First National Bank* v. *Williams*, 252 U. S. 504, 512. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. *Ibid; King County* v. *Seattle School District*, 263 U. S. 361, 363, 364. A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto (*New Orleans* v. *Benjamin*, 153 U. S. 411, 424; *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, 191; *Joy* v. *St. Louis*, 201 U. S. 332; *Denver* v. *New York Trust Co.*, 229 U. S. 123, 133), and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. *Tennessee* v. *Union & Planters Bank*, 152 U. S. 454; *Louisville & Nashville R. R.* v. *Mottley*, 211 U. S. 149; *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25; *Taylor* v. *Anderson*, 234 U. S. 74. Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense. *Devine* v. *Los Angeles*, 202 U. S. 313, 334; *The Fair* v. *Kohler Die & Specialty Co., supra.*

Looking backward we can see that the early cases were less exacting than the recent ones in respect of some of these conditions. If a federal right was pleaded, the question was not always asked whether it was likely to be disputed. This is seen particularly in suits by or against a corporation deriving its charter from an act of Congress. *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 817-828; *Pacific Railroad Removal Cases*, 115 U. S. 1, 11. Modern statutes have greatly diminished the importance of those decisions by narrowing their scope. *Gay* v. *Ruff*, 292 U. S. 25, 35; *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, 483. Federal incorporation is now abolished as a ground of federal jurisdiction except where the United States holds more than one-half the stock. Act of February 13, 1925, c. 229, § 12, 43 Stat. 936, 941. Partly under the influence of statutes disclosing a new legislative policy, partly under the influence of more liberal decisions, the probable course of the trial, the real substance of the controversy, has taken on a new significance. "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." *Shulthis* v. *McDougal*, 225 U. S. 561, 569. *Cf. First National Bank* v. *Williams, supra; Hopkins* v. *Walker*, 244 U. S. 486, 489; *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505, 507. Only recently we said after full consideration that the doctrine of the charter cases was to be treated as exceptional, though within their special field there was no thought to disturb them. *Puerto Rico* v. *Russell & Co., supra.* "We should fly in the face of this legislative policy and disregard precedents which we think controlling were we to extend the doctrine now." *Ibid.* Today, even more clearly than in the past, "the federal nature of the right to be established is decisive—not the source of the authority to establish it". *Ibid.*

Viewing the case at hand against this background of established principle, we do not find in it the elements of federal jurisdiction.

1. The suit is built upon a contract which in point of obligation has its genesis in the law of Mississippi. A covenant for a valuable consideration to pay another's debts is valid and enforcible without reference to a federal law. For all that the com-

plaint informs us, the failure to make payment was owing to lack of funds or to a belief that a stranger to the contract had no standing as a suitor or to other objections non-federal in their nature. There is no necessary connection between the enforcement of such a contract according to its terms and the existence of a controversy arising under federal law.

2. The obligation of the contract being a creation of the state, the question remains whether the plaintiff counts upon a federal right in support of his claim that the contract has been broken. The performance owing by the defendant was payment of the valid debts, and taxes are not valid debts unless lawfully imposed. From this defendant argues that a federal controversy exists, the tax being laid upon a national bank or upon the shareholders therein, and for that reason being void unless permitted by the federal law.

Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit. The tax here in controversy if valid as a tax at all, was imposed under the authority of a statute of Mississippi. The federal law did not attempt to impose it or to confer upon the tax collector authority to sue for it. True, the tax, though assessed through the action of the state, must be consistent with the federal statute consenting, subject to restrictions, that such assessments may be made. R. S. § 5219, 12 U. S. C. § 548. It must also be consistent with the Constitution of the United States. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664; *Baltimore National Bank* v. *Tax Commission*, 297 U. S. 209. If there were no federal law permitting the taxation of shares in national banks, a suit to recover such a tax would not be one arising under the Constitution of the United States, though the bank would have the aid of the Constitution when it came to its defense. *Tennessee* v. *Union & Planters Bank, supra; Sawyer* v. *Kochersperger*, 170 U. S. 303; *Arkansas* v. *Kansas & Texas Coal Co.*, 183 U. S. 185; *Louisville & Nashville R. R.* v. *Mottley, supra.* That there is a federal law permitting such taxation does not change the basis of the suit, which is still the statute of the state, though the federal law is evidence to prove the statute valid.

The argument for the respondent proceeds on the assumption that because permission at times is preliminary to action the two

are to be classed as one. But the assumption will not stand. A suit does not arise under a law renouncing a defense, though the result of the renunciation is an extension of the area of legislative power which will cause the suitor to prevail. Let us suppose an amendment of the Constitution by which the states are left at liberty to levy taxes on the income derived from federal securities, or to lay imposts and duties at their pleasure upon imports and exports. If such an amendment were adopted, a suit to recover taxes or duties imposed by the state law would not be one arising under the Constitution of the United States, though in the absence of the amendment the duty or the tax would fail. We recur to the test announced in *Puerto Rico* v. *Russell & Co., supra:* "The federal nature of the right to be established is decisive—not the source of the authority to establish it." Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority. To reach the underlying law we do not travel back so far. By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. *Louisville & Nashville R. R.* v. *Mottley, supra.* With no greater reason can it be said to arise thereunder because permitted thereby.

Another line of reasoning will lead us to the same conclusion. The Mississippi law provides, in harmony with the act of Congress (R. S. § 5219), that a tax upon the shares of national banks shall be assessed upon the shareholders, though the bank may be liable to pay it as their agent, charging their account with moneys thus expended. Code of Mississippi, § 3138. *Cf. Home Savings Bank* v. *Des Moines,* 205 U. S. 503, 518; *Aberdeen Bank* v. *Chehalis County,* 166 U. S. 440; *National Bank* v. *Commonwealth,* 9 Wall. 353. Petitioner will have to prove that the state law has been obeyed before the question will be reached whether anything in its provisions or in administrative conduct under it is inconsistent with the federal rule. If what was done by the taxing officers in levying the tax in suit did not amount in substance under the law of Mississippi to an assessment of the shareholders, but in substance as well as in form was an assessment of the bank alone, the conclusion will be inescapable that there was neither tax nor debt, apart from any barriers that Congress may have built. On the other hand, a finding upon evidence that

the Mississippi law has been obeyed may compose the controversy altogether, leaving no room for a contention that the federal law has been infringed. The most one can say is that a question of federal law is lurking in the background, just as farther in the background there lurks a question of constitutional law, the question of state power in our federal form of government. A dispute so doubtful and conjectural, so far removed from plain necessity, is unavailing to extinguish the jurisdiction of the states.

This Court has had occasion to point out how futile is the attempt to define a "cause of action" without reference to the context. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 67, 68. To define broadly and in the abstract "a case arising under the Constitution or laws of the United States" has hazards of a kindred order. What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end. *Bird* v. *St. Paul F. & M. Insurance Co.*, 224 N. Y. 47, 51; *Leyland Shipping Co.* v. *Norwich Fire Insurance Society*, (1918) A. C. 350, 369; *Insurance Co.* v. *Boon*, 95 U. S. 117, 130; *Milwaukee & St. Paul R. Co.* v. *Kellogg*, 94 U. S 469, 474. Instead, there has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation, so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.

The judgment should be reversed and the cause remitted to the District Court with instructions to remand it to the court in Mississippi from which it was removed.

Ordered Accordingly.